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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a state tax of a specified percentage of an airline's gross income from the airline business, sought to be imposed by the State of Hawaii under Haw. Rev. Stat. § 239-6, is prohibited by 49 U.S.C. § 1513(a), which forbids a state from levying a tax on the gross receipts derived from the carriage of persons traveling in air commerce or on the sale of air transportation, and the supremacy and commerce clauses of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Hawaii were Aloha Airlines, Inc. and the Director of Taxation, State of Hawaii. The United States of America appeared as amicus curiae in support of the position of Aloha Airlines, Inc.

This proceeding was consolidated before the Supreme Court of Hawaii with *In the Matter of the Tax Appeal of Hawaiian Airlines, Inc.* (Hawaii Supreme Court No. 7751). The parties to that proceeding were Hawaiian Airlines, Inc. and the Director of Taxation, State of Hawaii. The United States of America appeared as amicus curiae in support of the position of Hawaiian Airlines, Inc.

STATEMENT OF CORPORATE AFFILIATIONS

Except for a wholly owned subsidiary, Aloha Airlines, Inc. has no affiliates, parent companies, or subsidiaries.

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v.
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ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

ALOHA AIRLINES, INC. appeals from the Judgment of the Supreme Court of the State of Hawaii entered on July 7, 1982, which affirmed a decision of the Tax Appeal Court of the State of Hawaii.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii (with dissenting opinion) is reported at 65 Haw. ____ , and 647 P.2d 263. (App. 1) The decision of the Tax Appeal Court (App. 20) is not officially reported. The decisions are reprinted at the pages indicated in the Appendix to this Jurisdictional Statement.

JURISDICTION

This action was filed by the appellant, Aloha Airlines, Inc., in order to overturn an assessment against appellant of the Hawaii public service company tax under Haw. Rev. Stat. § 239-6, on the ground that the assessment is prohibited by a statute of the United States of America, 49 U.S.C. § 1513.

The opinion of the Supreme Court of Hawaii was announced on June 23, 1982, and Judgment was entered in accordance therewith on July 7, 1982. The decision of the Supreme Court of Hawaii upheld the assessment of the Hawaii public service company tax. Notice of Appeal was filed with the Supreme Court of Hawaii on August 6, 1982. (App. 28)

The jurisdiction of the United States Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2). In this case the validity of a statute of Hawaii, Haw. Rev. Stat. § 239-6, is drawn into question because of its being repugnant to a law of the United States, 49 U.S.C. § 1513, and the decision of the Supreme Court of Hawaii was in favor of validity of the Hawaii statute.

STATUTORY PROVISIONS INVOLVED

The federal and state statutes which are at issue in this case, 49 U.S.C. § 1513(a) & (b) and Haw. Rev. Stat. § 239-6, are set out in full in the Appendix at App. 30. The relevant portions are presented here. 49 U.S.C. § 1513(a) & (b) provide, in relevant part:

> § 1513. *State taxation of air commerce*
>
> *Prohibition; exemption*
>
> (a) No State . . . shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> *Permissible State taxes and fees*
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . .

Haw. Rev. Stat. § 239-6 provides, in relevant part:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students . . . the tax shall be three per cent of its gross income each year from the airline business. . . . The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

STATEMENT OF THE CASE

Aloha Airlines, Inc. (hereinafter "Aloha Airlines") is a commercial airline which carries persons, freight and mail between various islands of the State of Hawaii. Aloha Airlines' flights between these islands cross international waters. Therefore, Aloha Airlines operates its flights under authority of a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board and is a certified carrier of the United States Mails thereunder. Aloha Airlines is subject to the continuing regulation of the Civil Aeronautics Board.

Aloha Airlines' principal place of business is in Honolulu, Hawaii. However, Aloha Airlines has permanent sales offices located in six other states as well as in Canada and Japan. In addition, tickets on Aloha Airlines' flights are sold world-wide in conjunction with tickets on connecting flights of other airlines. Most of Aloha Airlines' passengers are persons whose travel began somewhere outside of Hawaii.

During the four years directly at issue in this case, 1974 through 1977, Aloha Airlines was required under Haw. Rev. Stat. § 239-6 to pay the Hawaii public service company tax, computed as a percentage of its gross income from the airline business.[1] Aloha Airlines timely filed a claim for the refund of the taxes on its gross receipts from the transportation of persons on the basis that such imposition of

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[1] The amounts of tax in controversy are $811,565.27 for 1974; $979,243.67 for 1975; $1,071,892.57 for 1976; and $1,367,756.00 for 1977, or a total of $4,230,457.51. Interest on the sums paid is also at stake in this litigation. In addition, since the controversy is a continuing one, similar assessments for later years remain in dispute.

the public service company tax violated 49 U.S.C. § 1513. The Hawaii Director of Taxation denied the claim for refund and Aloha Airlines took an appeal to the Hawaii Tax Appeal Court.

On June 9, 1978 the Hawaii Tax Appeal Court ruled that the imposition of the tax was not prohibited by 49 U.S.C. § 1513 (App. 20), and Aloha Airlines timely appealed to the Hawaii Supreme Court. Hawaiian Airlines, Inc., another commercial airline with headquarters in Hawaii, filed a similar tax appeal. Upon stipulated motion, the Aloha Airlines, Inc. appeal and the Hawaiian Airlines, Inc. appeal were consolidated for argument before the Supreme Court of Hawaii. In addition, the United States of America, *amicus curiae*, filed a brief and participated in oral argument with respect to the consolidated appeal. The United States joined both airlines in arguing that the imposition of the tax on the airlines is prohibited by the federal statute.

On June 23, 1982 the Supreme Court of Hawaii entered the opinion which is the subject of this appeal. (App. 1) The Hawaii Supreme Court held that the imposition of the public service company tax, Haw. Rev. Stat. § 239-6, was not prohibited by 49 U.S.C. § 1513 or in violation of the supremacy or commerce clauses of the United States Constitution.

In its opinion, the Supreme Court of Hawaii discussed the original purposes of the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970), and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970), concluding that the legislation was designed to provide for expansion and improvement of the Nation's airport system financed through a series of user taxes. (App. 6) The court further examined the motivation of Congress in passing the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, § 1-7, 87 Stat. 88 (1973), which included the provision primarily at issue, 49 U.S.C. § 1513. The Hawaii Supreme Court concluded that the 1973 legislation was simply motivated by increased revenue needs as well as the fear that the decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), would lead to "a proliferation of similar charges at airports throughout the country." (App. 8)

The Hawaii Supreme Court then looked at the language of 49 U.S.C. § 1513. The court recognized that "read literally, the subsection [49 U.S.C. § 1513(a)] decrees a federal preemption of the

entire field of commercial aviation taxes," but concluded that 49 U.S.C. § 1513(b) "demonstrates that Congress could not have intended so broad a preemptive sweep." The court therefore concluded that its task was to "harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b)." (App. 9)

Examining the question of federal preemption of the Hawaii public service company tax, the court stated that "there is no unerring test to determine just when a state provision is without effect by reason of preemption." (App. 12) The court relied upon *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), *overruled, Lee v. Florida*, 392 U.S. 378 (1968), for the proposition that:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

(App. 13)

Having concluded that there is no infallible test of preemption, the court determined that legislative intent must be relevant and made its own inferences as to what Congress had intended to accomplish by enacting 49 U.S.C. § 1513. It concluded that Congress had not intended to preempt any major taxes or primary revenue sources of the states. (App. 14) Instead, the court concluded that Congress intended primarily to preempt "head" or ticket taxes collected directly from shippers and passengers, those local charges most likely to cause delay or confusion among customers. (App. 15) Since the Hawaii public service company tax is collected from the airlines, the court concluded that it did not invade the area targeted for prohibition. (App. 16)

The court also concluded that the imposition of the Hawaii public service company tax was not incompatible with federal legislation because simultaneous compliance with the federal and state tax laws was not a physical impossibility. Since the airlines could pay both taxes, the court ruled that the federal law did not mandate invalidation of the Hawaii tax. (App. 17)

Justice Marumoto filed a dissenting opinion. He concluded that the plain language of a federal statute is controlling under the supremacy clause:

In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom . . .

prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant cases. (ellipses in original)
(App. 18)

THE QUESTION IS SUBSTANTIAL

1. THE IMPOSITION OF THE HAWAII TAX ON APPELLANT IS REPUGNANT TO THE PLAIN LANGUAGE OF THE FEDERAL STATUTE.

The opinion of the Hawaii Supreme Court did not dispute that under the commerce clause of the United States Constitution, Congress clearly has the power to limit or to prohibit any state taxation which Congress determines imposes a burden on interstate commerce. Rather, at issue here is whether by enacting 49 U.S.C. § 1513, Congress has prohibited the application of a tax such as this one by the State of Hawaii on Aloha Airlines. It is, therefore, the interpretation of 49 U.S.C. § 1513 which is in question.

The first rule of statutory construction is that such an examination must begin with the statutory language. "The starting point of our inquiry is the plain language of the statute itself." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981).

In this instance Congress has clearly and unambiguously exercised its commerce clause power to prohibit the imposition of any state tax on the gross receipts derived from the sale of air transportation by providing in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . ., directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* . . . (emphasis added)

Indeed, by reaching out to express in four separate ways the kinds of taxes that are prohibited, including an express prohibition of a tax on

"gross receipts," Congress could not have been any clearer.[2]

The Hawaii public service company tax is just such a tax levied or collected on the gross revenues derived from the sale of air transportation. Haw. Rev. Stat. § 239-6 provides in relevant part:

> There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business.[3]

The language of § 239-6 is clear. In fact, the Hawaii Supreme Court has affirmed that the public service company tax is to be levied and collected on all of the gross receipts from the sale of air transportation. In *In re Aloha Airlines, Inc.*, 56 Haw. 626, 547 P.2d 586 (1976), the Hawaii Supreme Court affirmed a decision of the Tax Appeal Court that "commissions retained by travel agents from *the proceeds of sales of air passage* on Aloha's flights are includable in Appellant's *taxable gross income*." 56 Haw. at 626, 547 P.2d at 586 (emphasis added). Therefore, the tax imposed by § 239-6 is levied and collected on Aloha Airlines' gross receipts from the sale of air transportation.

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[2]Although Aloha Airlines' flights are limited to flights between the islands of Hawaii, it is clear that Congress' power to regulate interstate commerce and thus to prohibit state taxation extends to the taxation of Aloha Airlines by the State of Hawaii. In addition to the interstate aspects of Aloha Airlines' operation described *supra*, at 3, flights among the islands of Hawaii necessarily represent "interstate or overseas air transportation" subject to federal regulation because they pass over the high seas, i.e., the channels between the islands of Hawaii. See *Island Airlines, Inc. v. Civil Aeronautics Board*, 352 F.2d 735 (9th Cir. 1965). In 1978 Congress confirmed that Hawaii interisland flights constitute "interstate or overseas air transportation." Part of the Airline Deregulation Act of 1978 provided that an aircraft operating between points in the same state which happens in flight to cross a boundary with another state, a foreign country, or the territorial waters of the United States should not be deemed by reasons of crossing such boundary to be operating in "interstate or overseas air transportation," but that provision expressly excluded the State of Hawaii, thus indicating that Hawaii flights continue to represent "interstate or overseas air transportation." 49 U.S.C. § 1305(b)(2). The opinion of the Hawaii Supreme Court did not rest on any contrary conclusion.

[3]Because Aloha Airlines has adopted a discount rate schedule for school groups as provided in the statute, the tax which the State of Hawaii has attempted to impose upon Aloha Airlines has been three per cent of its gross income each year from the airline business.

By virtue of 49 U.S.C. § 1513(b), the Hawaii Supreme Court purported to find "seeming contradictions" within the language of 49 U.S.C. § 1513, allegedly sufficient tc sustain the Hawaii tax. (App. 9) No such contradiction actually exists, though, as the language of § 1513(b) clearly does not negate the effect of § 1513(a):

> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added)

It is clear from the statutory language that Congress did not restrict its prohibition but merely distinguished other taxes not levied or collected on gross receipts. Nothing in subsection (b) says that a tax on such gross receipts is permissible.[4]

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[4] Although the opinion of the Hawaii Supreme Court did not rely upon such characterization, it should be noted that Haw. Rev. Stat. § 239-6 may attempt to pass itself off as a personal property tax. It states, in part:

> The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

That description cannot, however, exempt this tax under § 1513(b) from the prohibition contained in § 1513(a). As noted above, the wording of subsection (b) would not support that interpretation.

Moreover, the self-characterization of the Hawaii statute cannot be taken at face value. As observed in the dissenting opinion of Justice Marumoto, Hawaii does not have a personal property tax at this time, nor did it have one when this statute was enacted. (App. 18) Indeed, Hawaii has not assessed a personal property tax since 1947. The tax referred to as imposed by Chapter 237 is not a personal property tax but rather a general excise tax, collected as a percentage of gross income. Examination of the legislative history behind § 239-6 reveals that the sole and express purpose of its characterization as a "personal property" tax was to protect the tax from federal constitutional attack. At that time, in 1963, the federal statutory prohibition had not yet been enacted, so the Hawaii legislature's concern was with constitutional limitations. The relevant House Finance Committee Report states that:

> The purpose of this bill is to protect from attacks of unconstitutionality on the basis of the commerce clause the tax on . . . airlines . . . by clearly *characterizing* the tax as a property tax, measured by gross income.

H.C. Rep. No. 792 Finance on H.B. No. 57, 1963 House Journal 799 (emphasis added). Similarly, see S.C. Rep. No. 850 Ways and Means on H.B. No. 57, 1963 Senate Journal 950. In the House floor debate preceding final passage of the bill, according to the official record: "Representative McClung explained that the bill

The interpretation offered by the Hawaii Supreme Court is, therefore, directly contrary to the plain language of 49 U.S.C. § 1513. Moreover, since the Hawaii Supreme Court's interpretation of subsection (b) of that statute would, in effect, nullify the provision contained in subsection (a), it runs afoul of a second fundamental rule of statutory construction, which is "that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). If a tax which requires Aloha Airlines to pay a levy of three percent of "its gross income each year from the airline business" does not constitute a tax "directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom," then the entire federal statute has been rendered meaningless, inoperative, and insignificant.

2. THE HAWAII SUPREME COURT MISCONSTRUED THE "PRE-EMPTION" DOCTRINE IN ENDEAVORING TO READ THE FEDERAL STATUTE NARROWLY.

This Court has, over the years, discussed the pre-emption doctrine on several occasions. It is true, as observed in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), that whether Congress has precluded state action in a particular case is "often a perplexing question." And, it is true that this Court has observed on several occasions that it should not be lightly inferred that Congress has intended to pre-empt a state's authority. So, it was stated in *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), *overruled, Lee v. Florida*, 392 U.S. 378 (1968):

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would put all taxable businesses . . . under one tax statute to *get around* the problem of interstate commerce." 1963 House Journal 552 (emphasis added).

The legislature's attempt to circumvent a federal prohibition merely by inserting the property tax label cannot be given effect. In *Galveston, H. & S.A.R. Co. v. Texas*, 210 U.S. 217 (1908), this Court struck down an attempt to validate an unconstitutional tax by the use of a label:

> A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, *by giving the tax a particular name or by the use of some form of words*, can take away our duty to consider its nature and effect.

210 U.S. at 227 (emphasis added). Similarly, see *Railway Express Agency v. Virginia*, 358 U.S. 434, 441 (1959).

> It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Similarly, see *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. The Hawaii Supreme Court noted and relied upon these statements in reaching its conclusion. (App. 13) In implying that any presumption should operate in favor of the state statute here, however, the Hawaii Court plainly erred.

The decisions cited above and relied upon by the Hawaii court involved federal statutes and regulations which did not expressly limit the authority of the state, but rather posed implicit conflicts. In such instances, it was necessary to determine whether it was the intent of Congress in each such case to displace the state authority. Pre-emption may, however, be "either express or implied." *Fidelity Federal Savings and Loan Association v. de la Cuesta*, ____ U.S. ____, ____, 73 L.Ed.2d 664, 675, 102 S.Ct. 3014, 3022 (1982). Pre-emption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In this case, the pre-emption is explicit. The federal statute involved, 49 U.S.C. § 1513, prohibits certain state taxation, in so many words. That statutory language represents, in the words of *Schwartz v. Texas*, 344 U.S. at 202-03, "a clear manifestation of intention" to "supercede the exercise of the power of the state." Indeed, such statutory language represents the clearest such manifestation possible.

There is no room here, therefore, for any presumption that Congress did not intend to exercise federal supremacy or for extraordinary efforts to read the federal statute narrowly. The statute does not leave such pre-emption to be inferred; rather, it spells it out precisely.

If there is any presumption to be applied here, it runs in the other direction. The plain language of the statute here prohibits state taxation of gross receipts derived from the sale of air transportation. "Absent a 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Albernaz v. United States*, 450 U.S. 333, 336 (1981), quoting *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Thus, when the Court has been presented with cases involving express prohibitions of state taxation, as opposed to allegedly implied pre-emption of state authority, it has applied and enforced the prohibition without reference to the "presumptions" of *Maryland v. Louisiana*, *Schwartz*, and *Rice*. For example, in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), the issue was whether the New Mexico "electrical energy tax" ran afoul of 15 U.S.C. § 391, which prohibited any state from imposing a tax on the generation of electricity which discriminated against out-of-state residents. In reaching the conclusion that the New Mexico tax was prohibited, the Court simply examined the state tax and determined that it was within the confines of the explicit prohibition stated by Congress in 15 U.S.C. § 391, and did not find it appropriate or necessary to refer to any "presumption" in favor of the state statute. Similarly, see *Agricultural National Bank v. Tax Commission*, 392 U.S. 339 (1968).

Where Congress has, by the language of the federal statute, explicitly prohibited or restricted the authority of the states, in this instance to impose a certain form of taxation, the application of a presumption in favor of the state statute or of a notion that the federal statute should be narrowly construed does violence to the supremacy clause of the United States Constitution. The decision of the Hawaii Supreme Court here confused this Court's decisions concerning "implied pre-emption" with the more applicable "express prohibition" precedents, thereby failing to give adequate recognition to federal supremacy. In its misperception of the relevent law, therefore, that decision has raised a substantial federal question.

3. CONGRESS INTENDED TO PROHIBIT THE IMPOSITION OF TAXES SUCH AS THIS ONE.

As established above, the language of 49 U.S.C. § 1513(a) is plain in prohibiting the application of this tax by the State of Hawaii on Aloha Airlines. Further, that language must ordinarily be deemed conclusive. "When the terms of a statute are unambiguous, our inquiry comes to an end, except in rare and exceptional circumstances." *Howe v. Smith*, 452 U.S. 473, 483, (1981) (citations and internal quotations omitted). The Hawaii Supreme Court, nevertheless, relied upon its reading of the legislative history to hold that Congress did not intend to prohibit the application of the Hawaii tax. That conclusion was erroneous. Indeed, the clear expression of

legislative intent is quite to the contrary of the Hawaii court's perception, for it is plain that Congress intended to forbid the imposition of taxes such as this one.

Congress enacted the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970), and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970), in order to provide federal assistance in the development and expansion of the nation's airport system. This program was to be primarily financed by a tax of eight per cent of the gross receipts from the sale of domestic passenger tickets, a tax of five per cent of receipts from air freight, and a flat $3.00 tax on each international passenger ticket. H.R. Rep. No. 601, 91st Cong., 2d Sess., 1, 35-36, reprinted in [1970] *U.S. Code Cong. & Ad. News* 3047, 3082.

It was intended that the 1970 legislation would provide a uniform system of taxation for air transportation with the federal tax being the only tax imposed upon the air transportation system. See 119 Cong. Rec. 3349 (1973). In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972), however, it was held that notwithstanding the federal eight per cent tax on air tickets, under certain circumstances states or municipalities might also constitutionally tax passenger air travel.

Congress viewed this possibility as a direct threat to the federal airport and airway program established in 1970. The Senate Committee on Commerce strongly criticized the possibility of state taxation as posed by the *Evansville* decision because it would probably increase the cost and discourage the use of air travel. S. Rep. No. 12, 93rd Cong., 1st Sess. 17-22, reprinted in [1973] U.S. Code Cong. & Ad. News, 1434, 1446-51. In addition, the Senate Committee expressed concern that any state taxation of the gross receipts from the sale of air tickets could provide a "financial windfall" to the states, because there could be no assurance that the revenues received by the states would be spent for airport facilities. *Id.* at 1446. The Senate Committee therefore determined that it was necessary to forbid state taxation on the carriage of passengers by air in order to protect a rational program of airport development funded by a uniform federal tax. *Id.* at 1455. The result was the enactment of the statute at issue, 49 U.S.C. § 1513, a statute intended to impose a broad federal prohibition against state airline taxes.

In contrast, the Hawaii Supreme Court appears to have concluded

from the legislative history that Congress intended to prohibit only "head" taxes and taxes imposed directly on the passengers and freight users of the aviation system, rather than taxes imposed on airlines. That view seems impossible to square with the language in 49 U.S.C. § 1513(a) prohibiting taxation of "the gross receipts derived therefrom"; if Congress meant to forbid only head taxes it would not have included words which could only refer to the airlines. It is true that Congress meant to eliminate head taxes, as recounted in the legislative history cited by the Hawaii Supreme Court, but that does not mean that it meant to prohibit only such head taxes. A brief review of the history of the drafting of 49 U.S.C. § 1513 clearly reveals that it was intended more broadly to prohibit taxes such as the Hawaii public service company tax.

Congress first considered a prohibition of state taxes even before the *Evansville* decision. The original proposal, H.R. 2337, provided that: "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly on the carriage of persons in air transportation. . . ."[5] This broad prohibition was expanded in two subsequent bills, H.R. 14847 and H.R. 14991, to provide: "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, on persons traveling in air transportation. . . ."[6] Thus, even in its earliest drafts, the legislation which was to evolve into 49 U.S.C. § 1513 prohibited not only state taxes on passengers, but also state taxes on airlines.

When the *Evansville* decision was announced, Congress moved to enact a broad prohibition against state taxation. In congressional hearings Whitney Gillilland of the Civil Aeronautics Board testified regarding the general dangers of the proliferation of state and local air transportation taxes. He referred specifically to an Ohio tax on the

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[5]See Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. 24 (1972).

[6]*Id.* at 27.

gross receipts of an airline business.[7] That Ohio tax, levied on airlines and measured by four per cent of the gross receipts of the airline from the activity, was virtually identical in function and measure of tax to the Hawaii public service company tax.

In accord with this concern, a bill introduced by Senator Cannon, S.3755, further expanded the prohibition against state and local taxation specifically to cover state gross receipts taxes on airlines:

> Sec. 1113. No State (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation, . . . or on the gross receipts derived therefrom. . . .

S. Rep. No. 1005, 92d Cong., 2d Sess. 4 (1972). The language of S. 3755 was adopted by the Senate-House Conference Committee, with minor variations not relevant here. H.R. Rep. No. 1543, 92d Cong., 2d Sess. 1-3 (1972). Ultimately, however, the bill was pocket vetoed.

In 1973, a similar bill was reintroduced. At that time, the Ohio gross receipts tax was again specifically examined. Theodore Koetz, Ohio deputy tax commissioner, argued for the fairness of state gross receipts taxes and urged adoption of an exemption from the proposed federal prohibition for state gross receipts taxes.[8] Despite this appeal, in clear recognition that the legislation would bar state gross receipts taxes, Congress again passed the prohibition which is now law as 49 U.S.C. § 1513.

Thus, there is no conflict whatsoever between the legislative history of 49 U.S.C. § 1513 and the plain language of the statute. Congress clearly intended to and ultimately did prohibit the imposi-

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[7]Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S.2397, S.3307, S.3611 and S.3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2nd Sess. 136-40 (1972) (Statement of Whitney Gillilland); Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2nd Sess. 52 (1972) (Statement of Whitney Gillilland).

[8]Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S.38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 246-53 (1973) (Statement of Theodore Koetz).

tion of all state taxes on the gross receipts from the sale of air transportation. Because the decision of the Hawaii Supreme Court depends on the opposite conclusion, it cannot be sustained.

4. THIS QUESTION IS OF NATIONAL SIGNIFICANCE AND THE HAWAII DECISION IS IN CONFLICT WITH DECISIONS FROM OTHER JURISDICTIONS.

The problem posed by this tax is not unique to Hawaii. Other states and jurisdictions have enacted and attempted to impose identical or similar taxes, and still more may consider doing so. Nor is this the only litigation posing this question. The decision of the Hawaii Supreme Court is, however, the first final determination by a state judiciary sustaining this kind of tax in the face of 49 U.S.C. § 1513(a). The other states which have already reached final determinations have uniformly reached results exactly the opposite of the decision appealed here.

The City of Philadelphia attempted to impose a flat charge for each passenger embarking at the city's airport. In *Allegheny Airlines, Inc. v. City of Philadelphia*, 453 Pa. 181, 309 A.2d 157 (1973), the Pennsylvania Supreme Court merely cited the federal statute and struck down the tax, relying upon the plain language of 49 U.S.C. § 1513(a).

As noted above, Ohio formerly imposed an excise tax, measured as a percentage of gross receipts, on the privilege of engaging in the business of transporting persons or property by air within that state. The Attorney General of the State of Ohio rendered an opinion to the state tax commissioner that this tax was prohibited by 49 U.S.C. § 1513(a). See Ohio Rev. Code Ann. § 5745.02 (Baldwin); Ohio Op. Att'y. Gen. No. 73-117 (November 20, 1973).

Similarly, Arizona imposed a tax at the rate of one per cent on the gross proceeds or sales of companies engaged in the business of transporting passengers or freight by aircraft. In *State v. Cochise Airlines, Inc.*, 128 Ariz. 432, 626 P.2d 596 (1980), the Court of Appeals of Arizona found the imposition of the Arizona tax on passenger revenue to be prohibited by 49 U.S.C. § 1513(a).

Those Ohio and Arizona taxes and the current Hawaii tax are all imposed upon the same gross proceeds from the sale of air transportation. If the Hawaii decision is affirmed, it will effectively reverse contrary determinations in other jurisdictions and affirm the only precedent vitiating 49 U.S.C. § 1513(a).

The disposition of this case will also guide pending litigation in other jurisdictions. In *Air Transportation Association of America v. New York State Department of Taxation and Finance*, Memorandum Decision, Supreme Court, Albany County, New York, Special Term (June 3, 1982), the court applied 49 U.S.C. § 1513(a) to prohibit the imposition of a New York tax. That decision is on appeal. Litigation is also currently in progress in Alaska, *Wien Air Alaska, Inc. v. State of Alaska, Department of Revenue*, State of Alaska, Superior Court Appeal No. 3AN-81-8582 (filed December 10, 1981), and *Alaska Aeronautical Industries, Inc. v. State of Alaska, Department of Revenue*, State of Alaska, Superior Court Appeal No. 3AN-81-4286 (filed June 22, 1981). The potential for similar litigation exists in Delaware (Del. Code Ann. tit. 30, § 2301(d)), Indiana (Ind. Code Ann. § 6-2.1-2-2 (Burns)), Maryland (Md. Ann. Code art. 81, § 130), Mississippi (Miss. Code Ann. § 27-65-19, for years prior to 1979 only), Oklahoma (Okla. Stat. Ann. tit. 68, § 1354(C)(West)) Washington (Wash. Rev. Code Ann. § 82.16.020), and West Virginia (W. Va. Code § 11-12A-2).

The question presented by this appeal is, therefore, of nationwide interest. Based on the results to date elsewhere, it is the decision of the Hawaii Supreme Court which is out of step. Affirming the decision of the Hawaii Supreme Court would likely lead to a widespread avoidance of the prohibition contained in 49 U.S.C. § 1513(a).

5. THE UNITED STATES OF AMERICA VIEWS THE FEDERAL QUESTION RAISED IN THIS CASE TO BE SUBSTANTIAL.

The United States of America has presented its view on the question raised in this case by appearing *amicus curiae* before the Hawaii Supreme Court in this case to support the position of the airlines. As expressed at that time, in its view the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970), and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970), constitute a significant and important federal program for the development of air commerce. Any additional state or local taxes imposed upon the same tax base, the gross receipts or revenues of commercial airlines, threaten to disrupt the federal fiscal program to improve the airport and airway system.

In the stated view of the United States before the Hawaii court, "when, as we contend, such local tax burdens fall within federal statutory prohibitions contained in 49 U.S.C. 1513, the interest of the United States in addressing such local tax burdens is clear and obvious." Brief of the United States of America, *amicus curiae*, at 4. Because an important federal program is in jeopardy if the imposition of Hawaii tax is affirmed, clearly a substantial federal question is presented by this case.

6. APPEAL TO THIS COURT IS THE ONLY FEDERAL RECOURSE AVAILABLE TO APPELLANT FOR DEFENSE OF THE FEDERAL STATUTE.

In this action, Aloha Airlines is defending the effectiveness of the federal statute, 49 U.S.C. § 1513. It appears that Aloha Airlines is barred from bringing its case in the lower federal courts because the issue involves the imposition of a state tax, and under the Tax Injunction Act, 28 U.S.C. § 1341, recourse to the federal courts in such cases is limited. The Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Thus, unless the taxpayer can demonstrate that state court procedures are not "plain, speedy and efficient," it must state its defenses to the taxation, including rights under federal law, in the state system, and it is precluded from seeking relief in a federal district court. In compliance with the dictates of the Act, Aloha Airlines has proceeded through the Hawaii system.

The Tax Injunction Act is not meant to preclude all federal review, however. The need for a federal forum to provide a check on adverse decisions bearing on federal rights by state courts and state tax appeals was recognized by Congress when it enacted 28 U.S.C. § 1341. Responding to the question of a need for a federal forum, the House Judiciary Committee Report stated:

> But it must be remembered that in such cases, in the event of an adverse decision of the State court, an appeal lies to the United States Supreme Court so that the contestant may ultimately have his constitutional rights determined by the highest Federal court, even though he may not have access in the first instance to the United States district courts.

H.R. Rep. No. 1503, 75th Cong., 1st Sess. 3 (1937).

In observing the limitations of the Tax Injunction Act, this Court has noted the availability of such appellate review and has assured litigants that if the taxpayer proceeds unsuccessfully through a state court system, he may then "assert his federal rights and secure a review of them by this Court." *Great Lakes Dredge & Dock Company v. Huffman*, 319 U.S. 293, 301 (1943); see *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 515 n. 19 (1981). This system with availability of review by this Court, in the words of *Great Lakes Dredge*, 319 U.S. at 301, "affords an adequate remedy to the taxpayer."

The adequacy of that remedy rests, though, upon review by this Court. Aloha Airlines followed the prescribed course of seeking relief from the Hawaii tax appeal system, but it was rebuffed in that effort. Protection of Aloha Airlines' rights and, in a larger sense, defense of the effectiveness of 49 U.S.C. § 1513 depend upon effective review by this Court of the Hawaii decision.

CONCLUSION

The decision of the Supreme Court of Hawaii must be reversed. Its interpretation of 49 U.S.C. § 1513 is contrary to the plain language of that statute and vitiates it. It rests on a misconception of pre-emption precedent in a situation where the Congressional prohibition of state taxation is explicit. Further, the decision is contrary to the legislative history of the federal statute at issue.

Moreover, the question posed is a significant one. Similar tax statutes have been enacted by other jurisdictions, and an affirmance of the Hawaii decision would likely lead to other such statutes. The Hawaii decision is in conflict with decisions from other states. The threat to the federal fiscal scheme for financing airport and airway development is clear.

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1981

In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer (Case No. 1772)

and

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer (Case Nos. 1853 and 1868)

NOS. 7078 and 7751

APPEALS FROM THE TAX APPEAL COURT

HONORABLE YASUTAKA FUKUSHIMA, JUDGE

JUNE 23, 1982

RICHARDSON, C.J., LUM, NAKAMURA, J., RETIRED JUSTICE MARUMOTO IN PLACE OF OGATA, J., DISQUALIFIED, AND RETIRED JUSTICE MENOR ASSIGNED BY REASON OF VACANCY

OPINION OF THE COURT BY NAKAMURA, J.

Aloha Airlines, Inc. and Hawaiian Airlines, Inc. (hereafter Aloha and Hawaiian, respectively; the taxpayers, collectively) challenge the taxation of inter-island air carriers under the Public Service Company Tax Law, HRS Chapter 239, in these consolidated appeals from the Tax Appeal Court. They claim the assessment of a tax on the "gross income each year from the airline business" pursuant to HRS § 239-6[1] runs afoul of the federal constitution's Supremacy and Commerce Clause[2] because 49 U.S.C. § 1513 proscribes the levy of a tax premised on "the gross receipts derived" from air transporta-

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[1] HRS § 239-6 reads as follows:

> Airlines, certain carriers. There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below travelling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business. There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

[2] Article VI of the United States Constitution provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

and Article I, § 8, cl. 3 provides that:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

tion.[3] We conclude the State tax in question, as applied to the taxpayers, has not been rendered unconstitutional by the foregoing federal legislation and affirm the Tax Court's decisions.

I.

Aloha and Hawaiian are Hawaii corporations engaged in the transportation of persons, property, and mail by air between terminal and intermediate points in Hawaii. Prior to the enactment of S.L.H. 1981, c. 167, they fell within the meaning of "Public service company" as the term was defined in HRS § 239-2 because a common

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[3] 49 U.S.C. § 1513, in relevant part, reads:

State Taxation of air commerce

(a) Prohibition; exemption

No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Permissible State taxes and fees

Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

carrier by air was deemed a public utility by HRS § 269-1.[4] *See In re Tax Appeal of Aloha Airlines, Inc.*, 56 Haw. 626, 627, 547 P.2d 586, 587 (1976). Although the crucial federal statute was enacted in 1973 as part of the Airport Development Acceleration Act of 1973, the taxpayers nevertheless continued to file annual returns as required by HRS § 239-4 and to pay the tax as prescribed by HRS § 239-6 without question for several years thereafter. The taxpayers' present position on the invalidity of HRS § 239-6 as it applies to airlines was initially advanced in 1977 when Aloha filed amended returns for the 1973, 1974, and 1975 calendar years. Hawaiian sought no refund of the tax payments in question until 1978 when it submitted amended returns for 1973, 1974, 1975, and 1976. All claims for refunds were summarily disallowed by the State Director of Taxation (the Director). Aloha's return for 1976 and Hawaiian's return for 1977 reflected their present views regarding the unconstitutional nature of the Public Service Company Tax. The Director, however, ruled 49 U.S.C. § 1513 was "not applicable for Hawaii tax purpose," and assessments consistent with HRS § 239-6 were made. Timely appeals to the Tax Appeal Court from the Director's determinations on the refunds and assessments followed.

The appeals were submitted to the Tax Appeal Court for decision on stipulated facts and briefs filed by the taxpayers and the Director. Aloha and Hawaiian conceded they were public service companies within the meaning of HRS § 239-2, but argued, as they do here, that there is an irreconcilable conflict between HRS § 239-6 and 49 U.S.C. § 1513 and the State law has been voided by the federal statute. The court rejected their arguments, ruled the Public Service Company Tax is "a property tax and a general tax," and concluded the Director properly assessed the tax against the taxpayers.

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[4]A common carrier by air is no longer considered a "public utility" within the meaning of HRS Chapter 269, which governs the activities of the Public Utilities Commission. *See* S.L.H. 1981, c. 167, § 1, Hse. Stand. Comm. Rep. No. 512, in 1981 Hse. Journal, at 1151; Sen. Stand. Comm. Rep. No. 670, in 1981 Sen. Journal, at 1201; Sen. Stand. Comm. Rep. No. 864, in 1981 Sen. Journal, at 1285. While Act 167 freed airlines of regulation by the Public Utilities Commission and the payment of certain fees and charges, HRS § 239-6 was not amended. The taxpayers ostensibly are still subject to the tax imposed by HRS § 239-6 though they may not be public utilities or public service companies as defined by HRS § 239-2.

II.

Aloha asserts the State law in question contravenes the Commerce Clause and the Supremacy Clause of the federal constitution; Hawaiian's claim of unconstitutionality is premised on the Supremacy Clause. We begin our analysis with a review of the State and federal statutory provisions involved.

A.

Hawaii's Public Service Company Tax is a direct descendant of the Public Utility Tax which was adopted in 1932. Although airlines were not covered by the tax on public utilities when it first became effective, they became subject to the tax shortly thereafter.[5] Two decades later, air carriers were exempted from payment of the utility tax and subjected to taxation under the General Excise Tax Law.[6] The legislature reconsidered this decision in 1963 and again decided inter-island air carriers should be classified with public utilities for State tax purposes; it concomitantly redesignated the Public Utility Tax as the Public Service Company Tax. *See* S.L.H. 1963, c. 147, § 2(a). Airlines have since been subject to taxation pursuant to HRS § 239-6 which delineates the basis and the rates for assessing the tax against common carriers by air and water, motor carriers, and contract carriers other than motor carriers. The foregoing provisions levy a flat four or three percent tax on gross income from utility business. Others subject to the Public Service Company Tax are likewise taxed on the basis of their gross incomes, but at varying rates (beginning at 5.885%) determined in each case by the ratio between the net income and the gross income from utility business. *See* HRS § 239-5.

Our Territorial predecessors considered the nature of the levy in question early in the history of the Public Utility Tax; they concluded it "imposes a tax comparable to the *ad valorem* real and personal

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[5] A tax designated as the Public Utility Tax was imposed on public utilities by S.L.H. 1932, c. 43, which became effective on January 1, 1933. This tax was redesignated as the Public Service Company Tax by S.L.H. 1963, c. 147, § 2(a).

Air carriers became subject to the Public Utility Tax on June 30, 1933 when a previously enacted amendment of the legal definition of "public utility" to include air carriers became effective under the terms of S.L.H. 1927, c. 100.

[6] *See* S.L.H. 1953, c. 279. This measure was presumably enacted so all air carriers operating in Hawaii, including inter-island carriers previously taxed under the Public Utility Tax Law, would be taxed in similar fashion under the General Excise Tax Law.

property taxes otherwise imposed" by the laws of the Territory of Hawaii. *Hawaii Consolidated Railway v. Borthwick*, 34 Haw. 269, 281 (1937), *aff'd*, 105 F.2d 286 (1939). And the rationale for so concluding was stated in part as follows:

> Authorities on taxation have uniformly recognized with approval the efforts of some of the States to avoid the difficulties encountered in *ad valorem* assessments of the real and personal property of utilities actually employed in the utility business by substituting a tax upon gross incomes from utilities from utility business, upon net income from the same source or both. (See Lutz, Public Finance [2d ed.] p. 462, et seq.; Luce, "Assessment of Real Property for Taxation," 35 Mich. L. Rev. 1217; Ravage, "Valuation of Public Utilities for Ad Valorem Taxation," 41 Yale L.J. 487.) And this method of taxation of real and personal property of utilities within the taxing jurisdiction has the unqualified approval of the courts. It will suffice to cite the leading cases on the subject decided by the United States Supreme Court. (See *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 453, *United States Express Co. v. Minnesota*, 223 U.S. 335, 346; *Galveston, Harrisburg, etc. Ry. Co. v. Texas*, 210 U.S. 217, 226, 227.)

Id. at 280. In the court's view, the "earning capacity of property devoted to the utility business . . . [was] reflected by gross income from [the] utility business." *Id.* at 281. We have not had occasion to examine the relevant taxing provisions since the specific language covering the taxation of airlines and other carriers was adopted in 1963.

B.

Turning to the federal statutes, we initially note the Airport and Airway Development Act of 1970, 84 Stat. 219 (the Development Act) and the Airport and Airway Revenue Act of 1970, 84 Stat. 236 (the Revenue Act) were passed in tandem "to provide for the expansion and improvement of the Nation's airport and airway system." H.R. Rep. No. 91-601, 91st Cong., 2d Sess., 1, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3047, 3047. In short, the Development Act declared a congressional policy to increase federal expenditures for the foregoing purpose and the Revenue Act was designed to provide the means for implementation. "In substantial part, this purpose . . . [was] to be achieved through the imposition and application of airport and airway user charges." *Id.* Certain taxes already in existence were increased and other new aviation user taxes

were imposed to finance the desired expansion and improvement of the system. *See* 26 U.S.C. §§ 4261 and 4271. The taxes imposed on the air transportation of persons and property were made payable in each case "by the person making the payment subject to the tax."[7] 26 U.S.C. §§ 4261(d) and 4271(b)(1). And an Airport and Airway Trust Fund was established to serve as the repository of the taxes collected and the moneys appropriated for the program.[8]

Two years later Congress' attention was redirected to the program by a perceived need for even greater federal funding of the costs of airport development. But in the meanwhile the Supreme Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), had been issued. There, the Court held the imposition of "a charge by a State or municipality of $1 per commercial airline passenger to help defray the costs of

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[7]The legislative rationale for imposing the taxes on the ultimate users of air transportation was stated as follows:

> The Ways and Means Committee's action, insofar as commercial carriers are concerned, obtains most of the additional tax revenue from passenger and freight ticket taxes by increasing the present 5-percent passenger ticket tax to 8 percent and by imposing a new $3 "head" tax on passenger tickets for international flights and a new 5-percent "waybill" tax on air freight.
>
> The decision to derive the bulk of additional commercial aviation revenue from the passenger and freight ticket taxes was based upon three primary factors. First, extensive administrative experience is available from the present collection of the 5-percent passenger tax, and the collection of the additional 3 percent is merely a matter of a change in computation on the passenger's ticket from 5 percent to 8 percent (also, before 1958, a 3-percent tax was imposed on domestic freight by rail, motor vehicle, water, and air transportation). Second, a tax upon the value of a ticket or waybill will grow not only as air traffic increases in volume but also as prices rise. Third, a ticket tax is geared to charge an equitable tax related to the distance traveled and the cost per mile of air operation, since ticket prices for short flights are more per mile than long-line flights and the tax is proportional to the price of the ticket. Ticket taxes on passengers and shippers are therefore an efficient and equitable user charge imposed directly on the ultimate passenger and freight users of the commercial sector of the aviation system.

H.R. Rep. No. 91-601, *supra*, at 38-39, [1970] U.S. CODE CONG. & AD. NEWS, at 3084.

[8]When the provisions of the Revenue Act that imposed the increased and new user taxes expired on October 1, 1980 as a consequence of Congress' failure to agree on the terms of an extension, the trust fund contained approximately $3,700,000,000 in unobligated funds. *Airport and Airway System Development: Hearings Before the Subcomm. on Aviation of the Sen. Comm. on Commerce, Science, and Transportation*, 97th Cong., 1st Sess. 87 (1981) (Statement of Darrell Trent, Deputy Secretary, Dept. of Transportation).

airport construction and maintenance," *id.* at 709, did not necessarily constitute an undue burden on interstate commerce. Fearing a proliferation of similar charges at airports throughout the country, Congress included the provisions presently codified as 49 U.S.C. § 1513 in the Airport Development Acceleration Act of 1973, 87 Stat. 88-90 (1973). That the proscriptions embodied therein were in response to the judicial approval of the new head taxes adopted by state and local governments subsequent to the passage of the Airport and Airway Development and Revenue Acts of 1970 is expressly confirmed by a pertinent legislative document. *See* S. Rep. No. 93-12, 93d Cong., 1st Sess. 1, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 1434.[9]

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[9]The report states in relevant part that:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

S. Rep. No. 93-12, *supra*, at 17, [1973] U.S. CODE CONG. & AD. NEWS, at 1446.

This intent to preempt the levy of head or other user taxes is also stated in several other places in the report, to wit:

> The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

S. Rep. No. 93-12, *supra*, at 4, [1973] U.S. CODE CONG. & AD. NEWS, at 1435.

and

> S. 38 contains a prohibition on State taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax.

S. Rep. No. 93-12, *supra*, at 11-12, [1973] U.S. CODE CONG. & AD. NEWS, at 1441.

The preemptive language chosen by Congress, however, is couched in the broadest terms in one subsection of 49 U.S.C. § 1513. Section 1513(a) forbids the levy or collection of a state or local

> tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

Read literally, the subsection decrees a federal preemption of the entire field of commercial aviation taxes. For every tax, fee, or charge levied on air transportation must perforce be met, directly or indirectly, from gross receipts derived from "the airline business" or by the users of air transportation. But § 1513(b) demonstrates that Congress could not have intended so broad a preemptive sweep since the subsection permits the levy and collection of state and local

> taxes other than those enumerated in subsection (a) . . ., including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.

Property taxes, net income taxes, and franchise taxes, of course, are ordinarily derived from the "gross receipts" of airlines, and sales taxes applicable to air transportation can only be those where the incidence would normally be expected to fall on the ultimate users of airline services. Our task then is to harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b).

III.

Focusing on the allegations of unconstitutionality advanced by the taxpayers, we first address Aloha's assertion that HRS § 239-6, as it has been applied to inter-island air carriers, constitutes an undue burden on commerce.

Aloha claims the exaction of the tax in question is inconsistent with the Commerce Clause under principles enunciated in *Crandall v. Nevada*, 73 U.S. 35 (1867), *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), and *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., supra*. The cases in Aloha's estimation proclaim a "rule" that "a tax upon interstate commerce will only be constitutional if it is not excessive in comparison with the state and local governmental benefit conferred." Since the tax at issue gener-

ates revenues for the State's General Fund and not for purposes related to airport development and maintenance. Aloha argues the State confers no benefit in exchange for the levy and the tax therefore fails to pass constitutional muster.

But in *Crandall* and *Evansville-Vanderburgh*, the questioned charges were passenger head taxes imposed on persons traveling in interstate commerce, and in *Capital Greyhound Lines*, the tax in question was specifically levied on interstate and intrastate carriers for the privilege of using the roads of Maryland. Consequently, we find the foregoing citations of authority inapposite, and seek guidance instead from more recent Supreme Court decisions delineating definitive standards for determining whether a state tax infringes the Commerce Clause.

"In reviewing Commerce Clause challenges to state taxes, . . . [the] goal [of the Supreme Court] has . . . been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980)." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981). The analysis now favored by the Court is the four-part test described in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). "Under the test, a state tax does not offend the Commerce Clause if it 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.' 430 U.S., at 279." *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 617. Aloha does not dispute that the Public Service Company Tax satisfies the first three prongs of the four-part test; it argues, as we have noted, that the tax falters on the final leg because the moneys exacted by the State are not expended for airport purposes. But Aloha's belief in this regard does not reflect the Court's views.

The Court customarily affords states wide latitude in imposing general revenue taxes, and "there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of

the services provided to the activity." *Id.* at 622.[10] Moreover, this latitude is not "divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State." *Id.* at 623. For it was never "the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). And this share of the burden includes sharing in the cost of benefits such as "a trained work force and the advantages of a civilized society." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979). We experience no difficulty in concluding that the imposition of Hawaii's Public Service Company Tax on a Hawaii corporation engaged in business as an inter-island air carrier does not constitute an undue burden on commerce, and move on to the problems engendered by the Supremacy Clause.

IV.

A.

The Supremacy Clause provides that the "'Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the

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[10]The Court went on to say:

> Instead, our consistent rule has been:
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> > "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
> >
> > "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937) (citations and footnote omitted).
>
> See *St. Louis & S. W. R. Co. v. Nattin*, 277 U.S. 157, 159 (1928); *Thomas v. Gay*, 169 U.S. 264, 280 (1898).
>
> Commonwealth Edison Co. v. Montana, *supra*, 453 U.S. at 622-23.

Constitution or Laws of any State to the Contrary notwithstanding.' [U.S. Const.] Art. VI, cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect. See *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819). See *Hines v. Davidowitz*, 312 U.S. 52 (1941)." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Yet there is no unerring test to determine just when a state provision is without effect by reason of preemption. As the Court teaches us,

> [t]here is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress . . . [The] Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

Hines v. Davidowitz, supra, 312 U.S. at 67 (footnote omitted).

The preemption dispute of present concern implicates the State of Hawaii's taxing power. It is fundamental that "[t]he power of taxation is indispensable to . . . [the] existence [of state governments], and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824).[11] In this sense, it is like

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[11]The statement of Chief Justice John Marshall in this regard was:

> The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its

the police power. Hence, the "[c]onsideration [of a state tax] under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)." *Maryland v. Louisiana*, *supra*, 451 U.S. at 746. For the historic powers of the states are "not to be superseded . . . unless that . . . [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230. Or as the Court has otherwise stated,

> [i]t will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).

Rice also recounts the several ways in which congressional design to supplant state provisions "may be evidenced," namely:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations

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> nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c., to pay the debts, and provide for the common defence [sic] and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

Gibbons v. Ogden, *supra*, at 198-200.

> imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, *supra*. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538.

Rice v. Santa Fe Elevator Corp., *supra*, 331 U.S. at 230. And as the Court reiterates in *Maryland v. Louisiana*,

> [o]f course, a state statute is void to the extent it conflicts with a federal statute—if, for example, "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, *supra*, at 67.

Maryland v. Louisiana, *supra*, 451 U.S. at 747.

B.

Thus we carefully examine the statutes implicated in the present controversy to ascertain whether an unmistakable intent of Congress to displace the State law appears, mindful that there is no "infalliable constitutional test" to determine congressional purpose, *Hines v. Davidowitz*, *supra*, 312 U.S. at 67, but knowing that there are, nevertheless, several ways in which "[s]uch a purpose may be evidenced." *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230.

1.

We earlier observed that 49 U.S.C. § 1513 broadly forbids the levy by state and local governments of taxes or other charges on air commerce, yet permits the collection of a wide range of state and local taxes. But as we have also seen, the exercise of federal tax power in a particular field is not necessarily incompatible with a similar exercise of power by the states. What initially appears paradoxical in the federal statutory provisions actually tells us that the federal taxation of air transportation was not meant to nullify all state and local taxes related thereto. And if anything more may be gleaned from the enumerated exemptions in 49 U.S.C. § 1513(b), it is that the primary revenue sources of the states have been placed beyond the

preemptive reach of § 1513(a).[12]

2.

Since an inference of a pervasive federal scheme or a dominant federal interest barring the collection of all state taxes touching air transportation cannot be drawn from the relevant statutory language, we consider whether "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal . . . [a] purpose" to cause state tax laws such as HRS § 239-6 to be without effect. *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230.

The legislative history previously discussed confirms that the object of the pertinent provisions of the Airport Development Acceleration Act of 1973 was to protect the primary sources from which the Airport and Airway Revenue Act of 1970 sought revenue. *See* note 7 *supra.* These were, of course, the "[t]icket taxes on passengers and shippers . . . imposed directly on the . . . passenger and freight users of the commercial sector of the aviation system." *See* note 7 *supra. See also* note 9 *supra* and 26 U.S.C. §§ 4261 and 4271. The history further indicates a wellspring of annoyance contributing to the legislative action was the levy of "head" taxes on airline passengers by thirty-one state and local jurisdictions. S. Rep. 93-12, *supra,* at 21, [1973] U.S. CODE CONG. & AD. NEWS, *supra,* at 1450.[13] The wrath of Congress was undoubtedly directed at an unpopular tax which "brings on confusion, delay, anger and resentment and cuts

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[12]This is the view of an informed observer who states:

> The approach taken by the Airport Development Acceleration Act broadly restricts states from imposing taxes or "other charges" with respect to air commerce, but exempts from this broad restriction certain types of taxes such as property, income, franchise, and sales or use taxes. The exempted taxes are, of course, the major revenue sources for states and, accordingly, the Act effectively balances national interests and those of the states' revenue needs with respect to air commerce.

A. Parnell, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States,* 28 Cath. U. L. Rev. 227, 246 (1979) (footnote omitted).

When the law review article quoted above was written, the author was Senior Staff Counsel of the Ways and Means Oversight Subcommittee of the U. S. House of Representatives.

[13]Hawaii was not listed therein as a jurisdiction charging "head" taxes. This stands to reason, for no one has ever equated the Public Service Company Tax with a "head" tax.

against the grain of the traditional American right to travel among the States unburdened by travel taxes." S. Rep. 93-12 *supra*, at 17, [1973] U.S. CODE CONG. & AD. NEWS, *supra*, at 1446. But more significantly, these user charges also tapped the very sources of revenue that Congress had.

The State law, which antedates the Airport and Airway Revenue Act of 1970, imposes a tax on public service companies rather than the users of their services. The legislature has deemed the State levy "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value." HRS § 239-6. We would not quarrel with this legislative characterization; the tax has some attributes of a property tax. *See* note 14 *infra*. As our Territorial predecessors concluded, there is ample legal support for avoiding "the difficulties encountered in *ad valorem* assessments of the real and personal property of utilities . . . by substituting a tax upon gross incomes from utilities from utility business, upon net income from the same source or both." *Hawaii Consolidated Railway v. Borthwick, supra*, 34 Haw. at 280. For the formula "give[s] effect to the intangible factors which influence real values." *Railway Express Agency v. Virginia*, 347 U.S. 359, 364 (1954) (quoted with approval in *Railway Express Agency v. Virginia*, 358 U.S. 434, 442 (1959)). *See also Illinois Central Railroad v. Minnesota*, 309 U.S. 157 (1940).[14]

The object sought by the federal law therefore reveals nothing that would preclude the subjection of Aloha and Hawaiian to the Public Service Company Tax. Nor does the character of the obligations imposed by the Airport and Airway Revenue Act disclose anything that could cause the tax to be ineffective where airlines are concerned.

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[14] Hawaiian's report to its stockholders for 1978 states a net valuation of its "Property and Equipment" in 1977 of $43,195,318. Its reported gross income for the same year amounted to $69,079,368. We also presume there are intangibles which increase Hawaiian's value as a company and render it higher than the net value of property and equipment. This higher value could conceivably approximate the company's operating revenues. *See* Hawaiian Airlines, Annual Report 1978, at 9-10, and the Public Service Company Tax Return filed by Hawaiian on April 9, 1978.

The annual report also states that $2,930,390, representing "U.S. excise tax on transportation," was collected by Hawaiian. This sum, however, was "paid directly and not reported in passenger revenue." Hawaiian Airlines, Annual Report, *supra*, at 17. This reflects the taxation of users, not the airlines, under the federal tax scheme.

3.

What we said about the Public Service Company Tax in the preceding section would also apply to an inquiry on whether the state policy declared by HRS § 239-6 "may produce a result inconsistent with the objective of the federal statute." *Rice v. Santa Fe Elevator Corp, supra,* 331 U.S. at 230. The State does not purport to "regulate" any aspect of air commerce pursuant to § 239-6. The levy in question is a revenue measure in all respects; it does not conflict with a federal regulatory scheme in the manner than the Louisiana First Use Tax on Natural Gas did with federal statutes regulating natural gas pricing. *See Maryland v. Louisiana, supra.* Furthermore, the state tax does not invade the particular area occupied by 26 U.S.C. §§ 4261 and 4271, *i.e.*, [t]icket taxes on passengers and shippers . . . imposed directly on the . . . passenger and freight users of the commercial sector of the aviation system." *See* note 7 *supra.*

4.

We perceive no irreconcilable conflict between regimes here. "[C]ompliance with both federal and state . . . [tax laws] is [definitely not] a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul, supra,* 373 U.S. at 142-43, and HRS § 239-6 does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra,* 312 U.S. at 67.[15] Our review thus uncovers no persuasive reasons supporting preemption here, and we cannot say the nature of the federal and State taxes involved "permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul, supra,* at 142.[16]

The decisions of the Tax Appeal Court are affirmed.

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[15] We noted earlier that when pertinent provisions of the Airport and Airway Revenue Act expired on October 1, 1980, the Airport and Airway Trust Fund contained approximately $3,700,000,000 in unobligated funds. *See* note 8 *supra.* Speaking from the vantage point of hindsight, we would have to say the purpose and objective of Congress in enacting the provisions of 49 U.S.C. § 1513 were accomplished.

[16] Although the taxpayers now claim the language of 49 U.S.C. § 1513 clearly displays a preemptive design, this apparently escaped them for four years.

DISSENTING OPINION OF MARUMOTO, J.

I respectfully dissent. My dissent is based on the supremacy clause of the United States Constitution.

In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom . . .

prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant cases.

U.S.C. § 1513(b) provides: "Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, . . .," and HRS § 239-6 provides: "The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value, and is in lieu of the tax imposed by chapter 237 [General Excise Tax Law] but not in lieu of any other tax."

I do not think that mere characterization of the tax as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value," changes the essential nature of the tax as a tax "on the sale of air transportation or on the gross receipts therefrom."

At the present time, the State of Hawaii has no personal property tax as such, and there was none at the time HRS § 239-6 was enacted.

Under HRS § 239-6, the sole basis for determing the amount of the levy or collection is the gross income from the airline business. Such basis has no relationship to the value of the personal property used in the airline, tangible and intangible, including the going concern value.

Gross income of an airline is produced by a multitude of factors besides the personal property, tangible and intangible, used in the business.

In this connection, R.L.H. 1925 § 1320, quoted below in footnote 1, which was repealed in S.L.H. 1932 Second Special Session, Act 40, Section 72, is instructive.

[1]Text of R.L.H. 1925 § 1320:

Basis of value for taxation. All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its cash value.

Land shall be equally assessed, according to its value for use or occupancy; this value shall be determined in cities and towns, and wherever else practicable, by the Somer's system or other means of exact computation from central locations.

Provided, however, that in all cases where real and personal property, or several classes or kinds or parcels or real or personal property, respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

Land leased or sub-leased to others and not used by a taxpayer personally as a part of the combined property forming the basis of the enterprise for profit conducted by the taxpayer shall not be considered as a part of the combined property, nor included in the return or assessment of such property as a whole, but shall be separately returned and assessed.

In estimating the aggregate value of each such enterprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company, being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

In ascertaining the aggregate value of the property constituting the basis of an enterprise for profit for the purposes indicated by this section, there shall first be included all property combined and forming the basis of such enterprise, whether within the definition of real or personal property set forth in this chapter or not, and there then shall be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit.

Provided also, that the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory, other than any such corporation that by the terms of its franchise is required to pay a percentage of its gross income to the Territory, or county or city and county, shall be valued and assessed at not less than the total amount of the par value of the capital stock issued by such corporation.

APPENDIX B

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IN THE TAX APPEAL COURT OF THE STATE OF HAWAII

In the Matter of the Tax Appeal	)	CASE NO. 1772
	)	
	)	DECISION AND ORDER
of	)	
ALOHA AIRLINES, INC.	)	
	)	

DECISION AND ORDER

This case concerns the appeal of Aloha Airlines, Inc., from the assessments of the Public Service Company Tax (hereinafter "PSC Tax") for tax years 1974 through 1977 on the grounds that such assessments are in violation of 49 U.S.C. § 1513 and the Commerce Clause.

The facts in this case are set forth in the Stipulation of Facts on file with the record of this appeal and by reference are incorporated herein and made a part of the Decision.

Appellant Aloha Airlines, Inc. is a Hawaii corporation which engages in the air transportation of persons, freight, and mail solely between airports located within this State. *Stip.* 4. Appellant does not provide air transportation between this State and any other state and thus does not derive any gross income from interstate air transportation. *Stips.* 19 and 20.

Appellant's principal place of business is in Honolulu, Hawaii. *Stip.* 21. Virtually all of Appellant's employees and personal property, including all aircraft aviation equipment and supplies, are employed or located in Hawaii, except such employees and property used in connection with six of Appellant's sales offices located outside the State. *Stips.* 22 and 23.

For the tax years 1974 through 1977, the Director has levied and assessed the PSC Tax against the Appellant pursuant to HRS § 239-6. HRS § 239-6 states that the PSC Tax is levied and assessed upon the tangible and intangible personal property of the Appellant, including going concern value, in lieu of any other personal property, franchise, or privilege tax. *Stip.* 16. No other Hawaii tax has been levied and assessed upon the personal property of the Appellant. *Stip.* 16. Appellant does not pay any tax to any other state or foreign country upon its tangible and intangible personal property, including going concern value, except for such taxes as may be paid in connection with the various sales offices located outside Hawaii. *Stip.* 27.

On January 9, 1978, Appellant filed a Notice of Appeal in this Court appealing the assessment of the PSC Tax against it for the tax years 1974 through 1977. The amounts of tax in controversy are $811,565.27 for 1974; $979,243.67 for 1975; $1,071,892.57 for 1976; and $1,367,756.00 for 1977; and, in the aggregate total $4,230,457.51. *Stips.* 1 and 3.

The issue in this case is whether the PSC Tax is levied on gross receipts or on property. If it is levied on gross receipts it is expressly

prohibited by 49 U.S.C. § 1513, and if it is levied on property it is expressly allowed by the same statute.

Appellant contends that the PSC Tax in actual operation and effect is a tax on gross receipts even though the legislature has characterized it as a property tax. *Appellant's Reply Brief*, section B. Appellant also appears to argue that even if the PSC Tax is not levied on gross receipts, but is only measured by gross receipts, it is a tax which Congress intended to prohibit under 49 U.S.C. § 1513. *Appellant's Reply Brief*, section A.

The Director contends that the PSC Tax in actual operation and effect is a tax on property measured by gross receipts. The Director also contends that Congress never intended to prohibit the PSC Tax by enacting 49 U.S.C. § 1513.

The Court agrees with the Director.

The PSC Tax is a tax levied on property. All three branches of State government, the legislature, the department of taxation, and the courts have construed the PSC Tax or its predecessor, the public utilities tax, to be a property tax. See S.C. Rep. 850 on H.B. No. 57, Act 157, SLH 1963; Hawaii Tax Information Release No. 1; and *Hawaii Consolidated Railway v. Borthwick*, 34 Haw. 269, 280-281 (1937), affirmed 105, F.2d 286 (construing the public utilities tax).

This trinity of agreement by the three branches of State government, though not conclusive, has great weight in our determination of the nature and effect of the tax. *Railway Express Agency v. Virginia*, 358 U.S. 434, 440 (1959) (hereinafter "*REA II*"). While this local view is not conclusive on this court, "it cannot be rejected unless it can be said to be ill founded." *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 454 (1918).

In order to overturn the local view, the Court must find that in actual operation the incidence of the tax falls on gross receipts rather than on property. *REA II, supra;* and *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954) hereinafter "REA I"). The U.S. Supreme Court has consistently upheld the local view of state authorities construing taxes to be property taxes, unless the state levies more than one property tax on the same property incidence. Only where the U.S. Supreme Court has been faced with the incongruity of a state levying two property taxes on the same property incidence has the Court found the evidence strong enough to find that one of the taxes is actually a tax levied on gross receipts. *REA I, supra; REA II, supra; U.S. Express Co. v. Minn.*, 223 U.S. 335 (1912); *Cudahy*

Packing Co. v. Minn., supra; Great N. R. Co. v. Minn., 278 U.S. 503 (1929). Also *Galveston H. & S. A. R. Co. v. Texas, supra; Meyer v. Wells, Fargo, & Co.*, 223 U.S. 298 (1912); *New Jersey Bell Tel. Co. v. State*, 280 U.S. 338 (1930). And even then, the U.S. Supreme Court has never struck down the local view construing the tax as a property tax without other evidence showing that the tax in question is levied on gross receipts rather than on property. *REA I, supra.*

The PSC Tax is the only State tax levied on the personal property of Appellant. *Stip.* 16. Appellant has not shown that the PSC Tax is a tax on gross receipts. Therefore the PSC Tax is in operation and effect a property tax. In addition, it should be noted that the PSC Tax, in all material respects, is indistinguishable from the franchise tax upheld by the U.S. Supreme Court in *REA II* as a tax on property.

Appellant argues that the PSC Tax is a tax on gross receipts. Appellant argues that: (1) prior to 1964, Appellant was taxed under the general excise tax, a privilege tax measured by gross receipts, (2) after 1964, Appellant was taxed under the PSC Tax instead, a tax "characterized" as a property tax to "get around" the potential Commerce Clause objections to the general excise tax, (3) that the PSC Tax is a substitute for and an extension of the general excise tax, and (4) that the measure of the PSC Tax, by gross receipts, has no fair relation to the value of Appellant's personal property and therefore the tax is in fact one on gross receipts. Even if the PSC Tax was enacted to get around the Commerce Clause objections to the general excise tax by taxing property instead of privileges, the fact remains that for all years in question Appellant was taxed under the PSC Tax on its personal property, not on its privileges. Even if Appellant has been taxed under the general excise tax, it appears that this tax also would not be prohibited under 49 U.S.C. § 1513. The tax is levied on state privileges *measured* by gross receipts, and is not levied on gross receipts. *HC&D v. Yamane*, 48 Haw. 486 (1965).

Appellant further argues that the PSC Tax is really a tax on gross receipts because a tax on property cannot be fairly measured by gross receipts. "While it may be true that gross receipts are not the best measure [of the value of property], it is too late now to question its constitutionality. [Citations omitted]." *Railway Express Agency v. Virginia*, 358 U.S. 434, 441 (1959).

As the PSC Tax is a property tax, it is expressly allowed under 49 U.S.C. § 1513(b).

"Nothing in this section shall prohibit a state . . . from the levy or

collection of taxes other than those enumerated in subsection (a) of this section, including property taxes . . ."

Congress never intended to prohibit the PSC Tax by enacting 49 U.S.C. § 1513. Congress enacted 49 U.S.C. § 1513 in response to *Evansville-Vanderburgh Airport v. Delta Airlines*, 405 U.S. 707 (1977) which allowed each state in which a traveler enplaned or deplaned to levy a flat tax as compensation for the use of airport facilities. Congress felt that the cumulative effect of such taxes greatly increased the costs of air travel and thus burdened interstate commerce. Senate Debate on the ADAA of 1973, Exhibit G. p. 3. Congress enacted 49 U.S.C. § 1513 to prohibit only head taxes and other related taxes, which require only minimal local contacts with the state and which create the risk of multiple state tax burdens.

The assessment of the PSC Tax against the Appellant does not create the risk of multiple taxation by the states. No other state can levy a property tax on the personal property of Appellant. Appellant's argument that Congress intended to prohibit taxes which merely increase costs, but do not necessarily pose the threat of multiple tax burdens, is incorrect as Congress, by the same statute, expressly allowed property taxes and all other state taxes which do not impose multiple burdens.

Allegheny Airlines, Inc. v. City of Philadelphia, 309 A.2d 157 (Pa. 1973) cited by Appellant is inapposite as the tax found by the Pennsylvania Supreme Court to be prohibited by 49 U.S.C. § 1513 was clearly a head tax. In that case the only incidences that Pennsylvania had the power to levy on were the local activities prohibited under 49 U.S.C. § 1513. In order to generate needed revenues, Pennsylvania was forced to levy on such incidences because it had no jurisdiction over the airlines to assess a property tax, like the PSC Tax, against the airlines.

Appellant also contends that the PSC Tax is a burden on interstate commerce because the tax revenues are not used to benefit the Appellant and the airport system exclusively, but instead are used to benefit the State generally. This argument is inapposite as the PSC Tax is a property tax and a general tax, not a head tax on other compensatory use tax, and therefore cannot be judged by this criterion.

IT IS ACCORDINGLY ADJUDGED, ORDERED, AND DECREED that the Director of Taxation properly assessed the PSC Tax against the Appellant and that the assessments herein appealed are deemed proper government realizations.

DATED: Honolulu, Hawaii, June 9, 1978.

/s/ Yasutaka Fukushima
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ Michael A. Shea

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APPENDIX C

NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals	TAX APPEAL COURT CASE NOS. 1853 and 1868
of	APPEAL FROM DECISION AND ORDER, FILED
HAWAIIAN AIRLINES, INC.,	JANUARY 4, 1980
Taxpayer-Appellant.	HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal	TAX APPEAL COURT CASE NO. 1772
of	APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978
ALOHA AIRLINES, INC.,	
Taxpayer-Appellant.	HON. YASUTAKA FUKUSHIMA, JUDGE

JUDGMENT ON APPEAL

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NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NOS. 1853 and 1868 APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980 HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NO. 1772 APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978 HON. YASUTAKA FUKUSHIMA, JUDGE

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of Hawaii filed June 23, 1982, the decisions of the tax appeal court are affirmed.

DATED: Honolulu, Hawaii, July 7, 1982.

BY THE COURT:

/s/ Clement J.H. Chun
Clerk

APPROVED:

/s/ Edward H. Nakamura
Justice

APPENDIX D

NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NOS. 1853 and 1868 APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980 HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NO. 1772 APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978 HON. YASUTAKA FUKUSHIMA, JUDGE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

and

CERTIFICATE OF SERVICE

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NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NOS. 1853 and 1868 APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980 HONORABLE YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NO. 1772 APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978 HONORABLE YASUTAKA FUKUSHIMA, JUDGE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that Aloha Airlines, Inc., the Taxpayer-Appellant above named, hereby appeals to the Supreme Court of the United States from the Judgment on Appeal of the Supreme Court of Hawaii entered in this action on July 7, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: Honolulu, Hawaii, August 6, 1982.

/s/ Michael A. Shea
RICHARD L. GRIFFITH
MICHAEL A. SHEA

Attorneys for Appellant
ALOHA AIRLINES, INC.

APPENDIX E

49 U.S.C. § 1513

§ 1513. State taxation of air commerce

Prohibition; exemption

(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Nonapplicability of subsec. (a) to airport operating authority until December 31, 1973

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) of this section shall not apply to such authority until December 31, 1973.

APPENDIX F

Haw. Rev. Stat. § 239-6

§ 239-6 Airlines, certain carriers. There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business. There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

Office - Supreme Court, U.S.
FILED
MAR 10 1983
ALEXANDER L. STEVAS,
CLERK

NOS. 82-585 and 82-586
(Consolidated)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ALOHA AIRLINES, INC.,
Appellant,
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII,
Appellee.

HAWAIIAN AIRLINES, INC.,
Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

JOINT APPENDIX

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APPEALS DOCKETED OCTOBER 4, 1982
PROBABLE JURISDICTION NOTED JANUARY 10, 1983

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NOTE: The relevant opinions and orders of the courts below have already been reproduced in the Jurisdictional Statements of Aloha Airlines, Inc. in No. 82-585 ("82-585 J.S.") and of Hawaiian Airlines, Inc. in No. 82-586 ("82-586 J.S.") filed herein on October 4, 1982. The Decision and Order in Hawaii Tax Appeal Court Case No. 1772 appears at 82-585 J.S. at App. 20. The Decision and Order in Hawaii Tax Appeal Court Case Nos. 1853 and 1868 appears at 82-586 J.S. at A-28. The majority and dissenting opinions of the Hawaii Supreme Court appears at 82-585 J.S. at App. 1, and 82-586 J.S. at A-1, and the judgment of the Hawaii Supreme Court appears at 82-585 J.S. at App. 26 and 82-586 J.S. at A-34.

Relevant Docket Entries in Courts Below

A. Relevant Docket Entries in *In the Matter of the Tax Appeal of Aloha Airlines, Inc.*, Hawaii Tax Appeal Court Case No. 1772.

Date	Proceedings
Jan. 9, 1978	Notice of Appeal to Tax Appeal Court from Assessor.
Jan. 25, 1978	Answer.
Mar. 9, 1978	Stipulation of Facts.
June 9, 1978	Decision and Order: (1) Facts in Stipulation of Facts made part of decision; (2) Hawaii public service company tax ("PSC tax") held a property tax permitted by 49 U.S.C. § 1513(b); (3) PSC tax is tax on property measured by gross receipts; (4) Congress enacted 49 U.S.C. § 1513 to prohibit only head taxes and other related taxes.
June 16, 1978	Notice of Appeal to Hawaii Supreme Court.

B. Relevant Docket Entries in *In the Matter of the Tax Appeals of Hawaiian Airlines, Inc.*, Hawaii Tax Appeal Court Case Nos. 1853 & 1868.

Date	Proceedings
July 10, 1979	Notice of Appeal to Tax Appeal Court from Assessor in Case No. 1853.
July 30, 1979	Answer in Case No. 1853.
Oct. 4, 1979	Stipulation of Facts in Case No. 1853.

Oct. 26, 1979	First Supplemental Stipulation of Facts in Case No. 1853.
Nov. 9, 1979	Notice of Appeal to Tax Appeal Court from Assessor in Case No. 1868.
Nov. 23, 1979	Stipulation for Consolidation of Case Nos. 1853 & 1868 and Order Approving the same.
Jan. 4, 1980	Answer in Case No. 1868.
Jan. 4, 1980	Decision and Order: (1) Stipulated facts found to be facts of case; (2) the PSC tax is measured by the Taxpayer's gross income; (3) the PSC tax is a tax on property expressly permitted by 49 U.S.C. § 1513(b).
Jan. 16, 1980	Notice of Appeal to Hawaii Supreme Court.

C. Relevant Docket Entries in *In Re Tax Appeal of Aloha Airlines, Inc.*, Hawaii Supreme Court Appeal No. 7078 and *In Re Tax Appeals of Hawaiian Airlines, Inc.*, Hawaii Supreme Court Appeal No. 7751.

Date	Proceedings
July 20, 1978	Record on Appeal in Appeal No. 7078.
Feb. 22, 1980	Record on Appeal in Appeal No. 7751.
Mar. 18, 1980	Stipulation for Consolidation of Appeal Nos. 7078 and 7751 and Order Approving the same.
June 23, 1982	Opinion of Majority of Court: (1) Legislative history indicates purpose of 49 U.S.C. § 1513 was to prohibit taxes

	on passengers and freight users of commercial aviation system such as head taxes; (2) the PSC tax is imposed on airlines, not on passengers and freight users of commercial aviation system; (3) Compliance with 49 U.S.C. § 1513 and PSC tax law not impossible so PSC tax not prohibited by 49 U.S.C. § 1513 and Supremacy Clause.
June 23, 1982	Dissenting Opinion: (1) Plain meaning of 49 U.S.C. § 1513(a) prohibits the PSC tax; (2) Characterization of PSC tax as means of taxing personal property doesn't change essential nature of PSC tax as tax on sale of air transportation or gross receipts therefrom.
July 7, 1982	Judgment on Appeal: Decisions of Tax Appeal Court Affirmed pursuant to Hawaii Supreme Court Opinion.
Aug. 6, 1982	Notice of Appeal to Supreme Court of United States by Hawaiian Airlines, Inc.
Aug. 6, 1982	Notice of Appeal to Supreme Court of United States by Aloha Airlines, Inc.

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IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal	)	CASE NO. 1772
	)	
of	)	STIPULATION OF
	)	FACTS; ORDER
	)	
ALOHA AIRLINES, INC.	)	
	)	

STIPULATION OF FACTS

The parties hereto stipulate that for the purposes of this case, the following statements may be accepted as facts and all exhibits referred to and attached are incorporated in this Stipulation and made a part hereof; provided, however, that either party may produce other and further evidence material to the matters in dispute. The facts stated herein were true during each of the years in issue (1974 through 1977) unless specifically stated otherwise.

1. On January 9, 1978, Appellant filed in the Tax Appeal Court of the State of Hawaii a timely Notice of Appeal, designated as Case No. 1772, from assessments by the Director of Taxation of the State of Hawaii.

2. On January 25, 1978, Appellee filed in the Tax Appeal Court a timely Answer to the Notice of Appeal.

3. The Notice of Appeal pertains to the assessments of Public Service Company Taxes for the tax years 1974, 1975, 1976 and 1977. The amounts of tax in controversy are $811,565.27 for 1974; $979,243.67 for 1975; $1,071,892.57 for 1976; and $1,367,756.00 for 1977.

4. Appellant, a corporation organized and existing under the laws of Hawaii, engages in the transportation of persons, freight and mail by air between airports on various islands of this State. Appellant is a "public service company" as defined in Section 239-2 of the Hawaii Revised Statutes, as amended.

5. Appellant operates its flights under the authority of a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of the United States of America (the "CAB"), and Appellant is subject to the continuing jurisdiction of the CAB. The original permanent Certificate was issued by the CAB to Appellant in its former name of "Trans-Pacific Airlines, Ltd." on December 4, 1956, and was reissued to Appellant in its present name of "Aloha Airlines, Inc." on February 11, 1959. Copies of the original permanent Certificate and of the reissued permanent Certificate are attached hereto as Exhibits A and B, respectively.

6. Pursuant to the authority granted to it by the CAB, Appellant operates flights between the following cities:

Routes	Miles
Lihue and Kona	270
Lihue and Kahului	202
Lihue and Hilo	318
Lihue and Honolulu	102
Honolulu and Hoolehua	53
Honolulu and Hilo	216
Honolulu and Kona	170
Kahului and Kona	91
Kahului and Hilo	121

Kahului and Kamuela	78
Honolulu and Kamuela	171
Kona and Hilo	62
Kona and Kamuela	33
Hilo and Kamuela	45

A map is attached hereto as Exhibit C showing the flights operated by Appellant. Appellant alleges that all fares charged by Appellant for carrying passengers by air are subject to approval by the CAB.

7. Following is Appellant's tabulation of the total number of passengers carried and the total amount of gross receipts from carrying passengers during the years in issue. The numbers below are approximate only.

	Total Passengers	Total Gross Receipts From Carrying Passengers
1974	1,660,000	28,860,000
1975	1,780,000	32,640,000
1976	2,320,000	35,730,000
1977	2,480,000	44,100,000

8. Following is Appellant's tabulation of passengers carried by Appellant: (a) passengers whose flight pattern originated somewhere in Hawaii and (b) passengers who traveled to Hawaii via another carrier from some other state or territory of the United States or a country, traveled between islands on Aloha Airlines, and departed from the State via another carrier. This table is of approximate value only.

	Hawaii Origin		Non-Hawaii Origin	
	No. of Passengers	%	No. of Passengers	%
1974	550,000	33	1,100,000	67
1975	450,000	25	1,330,000	75
1976	540,000	23	1,780,000	77
1977	610,000	25	1,870,000	75

9. Tickets to fly on Appellant's flights are sold by Appellant, by other airlines and by travel agents throughout the United States and foreign countries.

10. During the years 1974-77 the Military Air-Sea Rescue Unit of the United States Air Force based at Hickam Air Force Base and the United States Coast Guard maintained air and sea assistance and rescue units at a constant state of readiness in Hawaii to assist airlines, including Appellant and, if needed, to rescue passengers in the event that a plane were forced to make an emergency landing at sea.

11. Each of the routes operated by Appellant during 1974-77, as listed in paragraph 6 above, except the routes between Hilo, Kona and Kamuela on the Island of Hawaii at some point, pass a distance of at least three miles from the Hawaiian coastline. Appellant alleges that under current treaties in force, the United States claims territorial jurisdiction over a territorial sea three miles from its coastline, and jurisdiction for customs and immigration purposes, but not for navigation, over a contiguous zone stretching up to twelve miles from its coastline as further supported by the affidavit attached hereto as Exhibit D. The United States is a signatory to the Convention on the Territorial Sea and contiguous Zone, 29 April 1958 [1964] 2 U.S.T. 1606, TIAS No. 5639, 516 UNTS 205, and also the Convention on the High Seas, 29 April 1958 [1962] 2 U.S.T. 2312, TIAS No. 5200, 450 UNTS 82. These treaties do not specify the width of the territorial sea, but limit the contigu-

ous zone to twelve miles, and state that all waters beyond the twelve-mile limit are considered international waters.

12. This Appeal is based on the claim of Appellant that the State of Hawaii is prohibited from levying the Public Service Company tax on Appellant's gross receipts derived from carriage of persons in air commerce by virtue of Title XI of the Federal Aviation Act of 1958, 49 U.S.C.A. Section 1513, 49 U.S.C. 1513, and also because the tax is an impermissible burden on interstate commerce. The Director of Taxation, State of Hawaii, responds that the imposition of tax herein violates neither the aforesaid Federal statute, 49 U.S.C. 1513(a), nor does it constitute an impermissible burden on interstate commerce. The aforementioned Federal statute, 49 U.S.C. 1513, was enacted as part of the Airport Development Acceleration Act of 1973, Public Law 93-44, which amended the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958. Attached as Exhibits E through L are the following documents relating to this legislation:

Exhibit	Report
E	Committee Explanation and Conference Report on Airport Development Acceleration Act of 1973
F	House Debate and passage of Airport Development Acceleration Act of 1973
G	Senate Debate and passage of Airport Development Acceleration Act of 1973
H	Senate Report on Airport Development Acceleration Act of 1973
I	House Report on Airport Development Acceleration Act of 1973
J	Conference Report on Airport Development
K	Senate Report on Amending the Airport and Airway Development Act of 1970
L	Report on Air Passenger Fees—State and Local Charges

13. Attached hereto as Exhibit M are excerpts from the Annual Reports of the Federal Aviation Administration of Operations under the Airport and Airway Development Act of 1970, showing Federal Airport grant-in-aid projects in Hawaii during the years 1974-1976.

14. The airport system of the State of Hawaii is administered by the Airports Division of the State Department of Transportation. Airport system revenues consist of concession fees income, building space and land rentals, aviation fuel tax, Federal grants, investment income, airport use charges and other miscellaneous income. Airport system expenses consist of operating expenses (including personnel and administration), maintenance renewal and replacement, airport equipment, construction of airport facilities, guard service, crash and fire protection, utilities and other miscellaneous expenses.

The cost of construction is represented by debt service and coverage on airport system revenue bonds guaranteed by the airlines and payable from airport revenues and by debt service and coverage on reimbursable general obligation bonds guaranteed by the State general fund. The debt service and coverage on the reimbursable general obligation bonds is paid from the State general fund and reimbursed by the airport system revenues. Airport revenue bonds constitute approximately 75% of the total and reimbursable general obligation bonds constitute approximately 25% of the total bonds issued with respect to the airport system.

Airport use charges are paid by signatory airlines and are calculated pursuant to Exhibit I to the airport lease agreement executed by Appellant, a copy of which is attached hereto as Exhibit N. The airport system revenues and expenses actually incurred by the Airports Division for the fiscal years 1974, 1975, 1976 and 1977 are set forth in detail in Exhibits O, P, Q and R, respectively, hereto. Appellant paid use charges total-

ling $201,000 in fiscal 1974; $232,000 in fiscal 1975; $416,000 in fiscal 1976 and $518,000 in fiscal 1977.

15. The State of Hawaii imposes real property taxes for airport lands upon the airlines under the airport lease agreements. Aloha Airlines or its subsidiaries paid real property taxes with respect to airport system property in the amount of approximately $30,000 for each of the tax years 1974 through 1977.

16. No Hawaii tax is levied and assessed upon the tangible and intangible personal property of Appellant, including going concern value, except that Section 239-6, Hawaii Revised Statutes, as amended, states that the Public Service Company Tax (hereafter "PSC Tax") is levied and assessed thereon in lieu of any other property or franchise tax with regard to said property.

17. The PSC Tax is measured by Appellant's gross income from the air transportation of passengers or freight between airports located within the State of Hawaii.

18. All of Appellant's aircraft have as their home port or tax situs an airport within the State of Hawaii.

19. Appellant does not provide air transportation between this State and any other state.

20. Appellant does not derive any gross income from the air transportation of passengers or freight between this State and any other state; except that whenever passengers travel between another state and a destination within this State via another carrier (as far as Honolulu or Hilo) and thereafter via Appellant on a common fare ticket, such other carrier pays to Appellant a portion of Appellant's full fare with respect to the carriage of such passenger between the port of entry and some other destination within the State.

21. Appellant's principal place of business is in Honolulu, Hawaii.

22. Appellant has permanent sales offices located in Japan, Canada, Alaska, California, Illinois, New York, Texas and Washington. Appellant has 31 full-time employees employed at those ticket offices. The remainder of Appellant's 886 full-time employees are employed in the State of Hawaii.

23. Except for Appellant's equipment, supplies, offices, bank accounts, real property, personal property and rights to property used in connection with the sales offices described in Stipulation 22, Appellant's aircraft, equipment, supplies, offices, bank accounts, real property, personal property and rights to property necessary or convenient to the operation of Appellant's air transportation business are located in Hawaii.

24. The following is Appellee's tabulation of 758 passengers carried by Appellant on March 1, 1978. The common fare passengers carried by the Appellant are divided between: (a) those whom Appellant carried on the same day that they arrived by a mainland carrier; and (b) those whom Appellant carried on any day subsequent to the day of their arrival.

Total Passengers	Total Common Fare Passengers	Same Day Passengers	Other Day Passengers
758	223	0	223

Appellee's tabulation does not include the total number of passengers carried by Appellant on March 1, 1978.

25. The air traffic volumes and the statement of operations for the airport system are as indicated in the tables on page 13 of the prospectus on the issuance of the $20,000,000 airport revenue bonds, 1977 series, attached hereto as Exhibit S (hereafter "Prospectus").

26. As of November 1, 1977, there were outstanding $65,895,631 reimbursable Hawaii general obligation bonds issued to the airport system. Prospectus, p. 7.

27. Except for the taxes in connection with the sales offices specified in Stipulation 22, Appellant does not pay any tax to

any other state or foreign country upon its tangible and intangible personal property, including going concern value.

28. Appellant does not pay any tax to any other state upon or measured by Appellant's gross income from the air transportation of passengers or freight.

29. Financing statements and security agreements with regard to Appellant's aircraft are filed and recorded in the Bureau of Conveyances, State of Hawaii.

DATED: Honolulu, Hawaii, March 8, 1978.

/s/ Michael A. Shea

RICHARD L. GRIFFITH
MICHAEL A. SHEA

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FLEMING & WRIGHT

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Aloha Airlines, Inc.

/s/ Kevin T. Wakayama

KEVIN T. WAKAYAMA
Deputy Attorney General
State of Hawaii

Attorney for Appellee,
Director of Taxation

APPROVED AND SO ORDERED:

/s/ Yasutaka Fukushima

Judge of the above-entitled Court

(All exhibits omitted in printing)

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CASE NO. 1853
IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal	)	
	)	
of	)	STIPULATION OF
	)	FACTS; ORDER
	)	
HAWAIIAN AIRLINES, INC.	)	
	)	

STIPULATION OF FACTS

IT IS HEREBY STIPULATED by and between the State of Hawaii, Director of Taxation, by and through the Attorney General of the State of Hawaii, and Hawaiian Airlines, Inc., by and through its attorneys, that certain facts in the above-captioned appeal, which has been designated as Case No. 1853, are as follows:

1. Taxpayer is Hawaiian Airlines, Inc. (hereinafter referred to as the "Taxpayer"), a Hawaii corporation, whose busi-

ness address is 1164 Bishop Street, 8th Floor, Honolulu, Hawaii 96813. Taxpayer is a corporation organized under the laws of the Territory of Hawaii, existing under the laws of the State of Hawaii and engaged in the transportation of persons by air between airports on various islands of the State of Hawaii. All of Taxpayer's passenger flights originate and terminate at airports located within the State of Hawaii. With the exception of such of Taxpayer's flights or portions thereof as are between airports on the Island of Hawaii, all of Taxpayer's passenger flights pass through the airspace over international waters. Taxpayer's passenger flights do not pass through the airspace of any other state or country.

2. On July 10, 1979, Taxpayer filed in the Tax Appeal Court of the State of Hawaii in this case a timely "Notice of Appeal to Tax Appeal Court from Assessor" (hereinafter "Taxpayer's Notice of Appeal") from Notices of Assessment by the Director of Taxation of the State of Hawaii (hereinafter the "Director") of Public Service Company Tax (hereinafter "PSC Tax") for the tax years 1974, 1975, 1976, 1977 and 1978 (hereinafter sometimes the "Subject Tax Years") which were mailed on June 12, 1979.

3. On July 30, 1979, the Director filed in the Tax Appeal Court of the State of Hawaii in this case, a timely answer to Taxpayer's Notice of Appeal.

4. Taxpayer's Notice of Appeal pertains to the aforesaid assessments of PSC Tax for the Subject Tax Years. The amounts of tax in controversy are as set forth in the Notices of Assessment of Additional PSC Tax for the Subject Tax Years, which are attached hereto as Exhibit "A" (hereinafter sometimes the "Assessments").

A. REVENUES FROM AIR COMMERCE

5. The Assessments are measured by the Taxpayer's gross receipts from the carriage of persons by air between airports on

islands of the State of Hawaii, over international waters.

6. The Assessments are assessments of PSC Tax under Chapter 239, Hawaii Revised Statutes. The Taxpayer is a "Public Service Company" as defined in Section 239-2(2), Hawaii Revised Statutes.

7. Taxpayer operates its business of transportation of persons by air under the authority of a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of the United States of America (hereinafter the "CAB"). The Taxpayer is an "interstate carrier" as defined by 49 United States Code Section 1501 for purposes of CAB jurisdiction and is subject to the continuing jurisdiction of the CAB because Taxpayer is a carrier of passengers, property and mail over the international waters which lie between the islands of the State of Hawaii. The original permanent Certificate of Public Convenience and Necessity was issued by the CAB to Taxpayer under its former name of "Inter-Island Airways, Limited" on June 16, 1939, and was reissued to Taxpayer under its present name of "Hawaiian Airlines, Inc." on September 7, 1967. Copies of the original permanent certificate and of the reissued permanent certificate are attached hereto as Exhibit "B".

B. INFORMATION REQUIRED ON TAXPAYER'S PSC TAX RETURNS

8. The Taxpayer's PSC Tax returns and amended returns for the Subject Tax Years are attached hereto as Exhibit "C".

9. A copy of State of Hawaii, Department of Taxation, Form U-6, the PSC Tax return, is attached hereto as Exhibit "D". A set of the instructions promulgated by the Director and governing with respect to such returns are attached hereto as Exhibit "E".

Form U-6 and the instructions thereto are stipulated into evidence to show that certain taxpayers (including airlines, motor carriers, certain water carriers and contract carriers) are

required to provide on Form U-6 only their respective gross receipts or gross incomes from such PSC businesses on page 1 of Form U-6 and then to compute the PSC Tax due on page 1 of Form U-6, while certain other taxpayers (public utilities taxed under Section 239-5, Hawaii Revised Statutes) are required to provide on Form U-6 all the information required on pages 1, 2, 3 and 4 of Form U-6.

10. The Public Service Companies required to pay the PSC Tax *other than* airlines and other carriers taxed by Section 239-6, Hawaii Revised Statutes, are granted an exemption from real property taxes by Chapter 239, Hawaii Revised Statutes. No such exemption is granted by Chapter 239, Hawaii Revised Statutes, to airlines and, accordingly, the Taxpayer paid real property taxes to the Director under Chapter 246, Hawaii Revised Statutes, on its real property in Hawaii in 1973 and during the Subject Tax Years.

11. Taxpayer contends that the amount of PSC Tax payable by Taxpayer in the Subject Tax Years would remain the same if (i) Taxpayer owned no tangible personal property whatsoever in the State of Hawaii in 1973 and the Subject Tax Years, (ii) all of the personal property used in Taxpayer's business during such years was owned by third parties and leased to Taxpayer, and (iii) the amount of Taxpayer's gross receipts for such years remained constant. The Director disagrees with such contention principally on the basis that such a fact situation could never occur.

C. AIRPORT DEVELOPMENT ACCELERATION ACT FUNDS IN HAWAII

12. Taxpayer contends herein that the Director is prohibited from levying the PSC Tax on its gross receipts from transportation of persons in air commerce and the sale of air transportation by subsection (a) of 49 United States Code Section 1513, which was enacted as part of the Airport Development

Acceleration Act of 1973, Public Law 93-44, which in turn was an amendment to the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958. The Director contends that the PSC Tax is a personal property tax and thus imposition of the PSC Tax on the personal property of the Taxpayer does not violate such statute, but rather is expressly permitted by subsection (b) of 49 United States Code Section 1513.

13. In enacting the Airport Development Acceleration Act of 1973, Congress intended to accomplish three purposes: (i) to strengthen the federal program to assist airport development throughout the United States, (ii) to prohibit certain kinds of local taxation of air commerce, and (iii) to increase the federal share of the funding of airport development. A chart included in Eighth Annual Report of Operations Under the Airport and Airway Development Act (1977) and showing the history of federal grants for airport development from 1947 to 1980 as authorized by Congress is attached hereto as Exhibit "F".

14. The Director's table below shows the gross revenues and gross expenditures of the airport system of the State of Hawaii for the years ending in 1971 through 1979. Gross revenues are broken down into State of Hawaii and federal contribution components.

All airport system revenues described in Paragraph 19 of this Stipulation other than federal grants are included in state gross revenues in the Director's table on following page.

Year	Total Gross Revenues	Gross Revenues		Gross Expenditures
		State (%)	Federal (%)	
1971	$ 85,183,000	$84,898,000 (99.7%)	$ 285,000 (0.3%)	$63,634,000
1972	50,392,000	49,200,000 (97.6%)	1,192,000 (2.4%)	51,611,000
1973	93,414,000	88,777,000 (95%)	4,637,000 (5.0%)	58,395,000
1974	43,629,000	35,417,000 (81%)	8,212,000 (19%)	57,317,000
1975	77,911,000	69,882,000 (90%)	8,029,000 (10%)	79,694,000
1976	90,635,000	87,023,000 (96%)	3,612,460 (4%)	95,333,000
1977	71,963,000	59,182,000 (82%)	12,781,000 (18%)	76,131,000
1978	111,388,000	96,340,000 (86%)	15,048,000 (14%)	84,211,000
1979	83,953,000	76,159,000 (91%)	7,794,000 (9%)	92,392,000

15. For the period including fiscal years ending 1971 to 1973, capital outlays for airport and airway development in Hawaii were funded approximately 7.4% from federal grants and approximately 92.6% from other sources. For the period including fiscal years ending 1974 to 1978, (after the enactment of the Airport Development Acceleration Act of 1973), federal grants accounted for approximately 29.9% of such capital outlays and other sources accounted for approximately 70.1%.

16. Attached hereto as Exhibit "G" are (i) four tables and a summary thereof, based on annual Consolidated Statements of Receipts and Expenditures, State of Hawaii, Department of Transportation showing capital improvement expenditures in airport and airway development in Hawaii during the period including fiscal years ending 1971 to 1978 and for certain other periods and federal grants to the Department with respect thereto, showing capital expenditures for 1974-78 of $159,660,000.00 and federal grants with respect thereto of $47,682,000.00 and capital expenditures for 1971-73 of $82,421,000.00 and federal grants with respect thereto of $6,114,000.00 and (ii) excerpts from the annual reports of the Federal Aviation Administration of operations under the Airport and Airway Development Act of 1970, showing federal airport grants granted for projects in Hawaii during the years 1974-77 and an excerpt from the permanent records of the Airports Division, U.S. Federal Aviation Administration, Honolulu, Hawaii showing funds obligated for projects in Hawaii in 1978, and indicating expenditures in Hawaii for 1974-78 of $49,711,726.000.

17. The Prospectus entitled "Official Statement Relating to $20,000,000 State of Hawaii Airport System Revenue Bonds, Series of 1977," attached hereto as Exhibit "H" (hereinafter the "Prospectus"), describes the operation of the airport system. The Hawaiian Airlines, Inc. 1978 Annual Re-

port to stockholders is attached hereto as Exhibit "I" and Securities and Exchange Commission Form 10-K of Hawaiian Airlines, Inc. for the fiscal year ended December 31, 1978 is attached hereto as Exhibit "J".

18. As of November 1, 1977, there was outstanding $65,895,631.00 in reimbursable Hawaii General Obligation Bonds issued to the airport system. Prospectus, p. 7. As of July 1, 1979, there was outstanding $232,510,000.00 in Hawaii Airport System Revenue Bonds.

19. The airport system of the State of Hawaii is administered by the Airports Division of the State of Hawaii, Department of Transportation. Airport system revenues consist of concession fees income, building space and land rentals, aviation fuel tax, federal grants, investment income, airport use charges (landing fees) and other miscellaneous income. Airport system expenses consist of operating expenses (including personnel and administration), maintenance renewal and replacement, airport equipment, construction of airport facilities, guard service, crash and fire protection, utilities and other miscellaneous expenses.

The cost of construction is paid by (1) federal revenues under the Airport and Airway Development Act of 1970, (2) surplus moneys in the airport system revenue fund, (3) airport system revenue bonds guaranteed by the airlines and payable from airport revenues and (4) reimbursable general obligation bonds guaranteed by the State general fund. The debt service on and the reimbursable general obligation bonds are paid from the State general fund and reimbursed by the airport system revenues. Airport revenue bonds constitute approximately 75% of the total bonds issued with respect to the airport system, and reimbursable general obligation bonds constitute approximately 25% of the total bonds issued with respect to the airport system.

Airport charges are paid by signatory airlines and are calculated pursuant to "Amended Exhibit One" to the airport lease agreement executed by Taxpayer, a copy of which is attached hereto as Exhibit "K".

Taxpayer's gross airport use charges (landing fees) and applicable aviation fuel tax credit amounts (indicated parenthetically) were $371,598 ($231,302) in 1973, $349,278 ($226,981) in 1974, $462,646 ($228,370) in 1975, $715,021 ($232,340) in 1976, $789,039 ($243,831) in 1977, and $746,610 ($254,211) in 1978. Taxpayer paid net airport use charges (landing fees) totaling $140,296 in 1973, $122,297 in 1974, $234,276 in 1975, $482,681 in 1976, $541,151 in 1977 and $489,374 in 1978.

The State of Hawaii, Department of Transportation, Airports Division, Consolidated Statement of Receipts and Expenditures for fiscal years ending in 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978 and 1979 are attached hereto as Exhibit "L".

The airport system revenues and expenses actually incurred by the Airport Division for the fiscal years ending in 1974, 1975, 1976, 1977 and 1978 are set forth in detail in the schedules attached hereto as Exhibit "M".

20. The State of Hawaii imposes real property taxes for airport system property upon airlines under its airport lease agreements. Taxpayer paid real property taxes with respect to airport system property in the total amount of $39,758.00 for 1973, $40,011.00 for 1974, $42,356.00 for 1975, $40,968.00 for 1976, $37,946.00 for 1977 and $40,694.00 for 1978. These amounts are in addition to Taxpayer's payments of Hawaii real property taxes imposed on Taxpayer's real property, as described in Paragraph 10 hereof.

21. Taxpayer contends that no Hawaii tax is levied and assessed upon the tangible and intangible personal property of the Taxpayer, including going concern value, or the tangible

and intangible personal property of any other taxpayer in the State of Hawaii.

D. **INTERSTATE COMMERCE**

22. Pursuant to the authority granted to Taxpayer by the CAB, Taxpayer's operations to and from airports in the State of Hawaii includes flights between the following airports:

ROUTES	LENGTH OF ROUTES IN MILES
Lihue and Kona	270
Lihue and Kahului	202
Lihue and Hilo	318
Lihue and Honolulu	102
Honolulu and Molokai	53
Honolulu and Kahului	100
Honolulu and Hilo	216
Honolulu and Kona	170
Molokai and Lanai	28
Kahului and Kona	91
Kahului and Hilo	121
Kahului and Waimea	78
Kahului and Molokai	47
Kahului and Lanai	34
Honolulu and Waimea (Kamuela)	171
Kona and Hilo	62
Kona and Waimea (Kamuela)	33
Hilo and Waimea (Kamuela)	45

A map attached hereto as Exhibit "N" illustrates certain of the flights operated by Taxpayer. All fares charged by Taxpayer for carrying passengers in air commerce were filed with the CAB during the Subject Tax Years.

23. The total amount of gross receipts from transportation of passengers in air commerce or the sale of air transportation by

Taxpayer during the years in issue are as follows:

YEAR	TOTAL GROSS RECEIPTS FROM CARRYING PASSENGERS
1974	$48,582,253
1975	$54,882,270
1976	$59,403,193
1977	$64,406,778
1978	$80,896,103

Such gross receipts amounts include (i) gross receipts from the Taxpayer's transportation of passengers in air commerce between airports on islands of the State of Hawaii over international waters and (ii) gross receipts from sales of tickets for air transportation on Taxpayer's flights between airports on islands of the State of Hawaii which were not used during the above years.

24. Taxpayer's passengers include (i) passengers whose flight patterns originated in Hawaii and (ii) passengers who, on a round-trip ticket: traveled to Hawaii via another carrier from outside of Hawaii, traveled between islands via Taxpayer's flights and departed from Hawaii via another carrier. Taxpayer's passengers in the latter category included passengers whose other flights concluded or commenced within 24 hours of their flights with Taxpayer and those whose other flights did not conclude or commence within 24 hours as aforesaid. The following is a tabulation of (a) Taxpayer's gross receipts from Taxpayer's passengers whose flight patterns originated within the State of Hawaii, and (b) Taxpayer's gross receipts from Taxpayer's passengers traveling from outside of Hawaii (from other states or countries), and traveling on Taxpayer's flights.

HAWAII ORIGIN

Year	(a) Passenger Gross Receipts	% of Total
1974	$17,773,228	36.6%
1975	$19,985,243	34.4%
1976	$20,134,040	33.9%
1977	$21,425,387	33.3%
1978	$24,866,506	30.8%

NON-HAWAII ORIGIN

Year	(b) Other States and International Passenger Gross Receipts	% of Total
1974	$30,809,025	63.4%
1975	$34,897,027	62.6%
1976	$39,269,153	65.9%
1977	$42,986,391	66.7%
1978	$53,124,105	69.2%

25. Tickets to fly on Taxpayer's flights are sold by Taxpayer throughout the United States of America and in foreign countries and by travel agents in Hawaii (52.1% during November 1978 and 48.3% during December 1978), and by other airlines and by travel agents outside of Hawaii (47.9% in November 1978 and 51.7% in December 1978). Over 90% of the gross billings of Taxpayer from ticket sales by other airlines and by travel agents outside of Hawaii in November and December of 1978 were with respect to tickets for passengers who on a round-trip ticket traveled to Hawaii via another carrier from outside of Hawaii, traveled between islands via Tax-

payer's flights and departed from Hawaii via another carrier as follows:

Period	Taxpayer's Gross Billings on Tickets Sold by Other Airlines And Agents	Taxpayer's Gross Billings on Tickets Sold by Other Airlines and Agents—Passengers traveling on tickets with initial departure from and final return to outside of Hawaii	% of Total
11/78	$3,273,882.16	$3,169,284.35	96.8%
12/78	$3,373,575.15	$3,291,201.40	97.6%

Of the ticket sales by Taxpayer and travel agents in Hawaii in November 1978 and December 1978, 38.5% and 41.4% of such sales, respectively, were with respect to tickets for passengers traveling from outside of Hawaii (mainland United States of America or foreign), as follows:

Period	Taxpayer's Gross Billings on Tickets Sold by Taxpayer and Travel Agents in Hawaii	Taxpayer's Gross Billings on Tickets Sold by Taxpayer and Hawaii Travel Agents—Passengers with initial departure from and final return to outside of Hawaii	% of Total
11/78	$3,563,793	$1,373,504	38.5%
12/78	$3,156,627	$1,306,373	41.4%

26. During 1973 and the Subject Tax Years, the Military Air-Sea Rescue Unit of the United States Air Force based at Hickam Air Force Base and the United States Coast Guard maintained air and sea assistance and rescue units in a constant state of readiness in Hawaii to assist all persons in need of air-sea rescue, including airlines, boats and ships, private and commercial, including Taxpayer, and, if needed, to rescue

airline passengers in the event that a plane were forced to make an emergency landing at sea.

27. Each of the Taxpayer's passenger routes listed in Paragraph 22 above, except the routes between Hilo, Kona and Waimea (Kamuela) on the Island of Hawaii, at some point passes a distance of at least three miles from the coastline of the State of Hawaii. Each of the Taxpayer's passenger routes listed in Paragraph 22 above, except the routes between Hilo, Kona and Waimea (Kamuela) on the Island of Hawaii at some point passes at least twelve miles from the coastline of the State of Hawaii. Taxpayer did not provide regular service between Hilo, Kona and Waimea on the Island of Hawaii during the Subject Tax Years as evidenced by the absence of such routes from Taxpayer's Schedule attached hereto as Exhibit "O". Taxpayer alleges that under current treaties in force, the United States of America claims territorial jurisdiction over a territorial sea three miles from its coastline, and jurisdiction for customs and immigration purposes, but not for navigation, over a contiguous zone stretching up to twelve miles from its coastline. This is further supported by the affidavit and treaties attached hereto as Exhibit "P". The United States of America is a signatory to the Convention on the Territorial Sea and Contiguous Zone, *effective*, September 10, 1964, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, and also the Convention on the High Seas, *effective*, September 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. These treaties do not specify the width of the territorial sea, but limit the contiguous zone to twelve miles, and state that all waters beyond the twelve mile limit are considered international waters.

28. The Taxpayer's executive offices and principal administrative office are in Honolulu, Hawaii. As of December 31, 1978, the Taxpayer maintained 8 airport offices, 8 non-

airport ticket offices and 2 other non-airport offices in the State of Hawaii.

29. The Taxpayer maintains 13 permanent ticket offices outside of Hawaii at the following locations: Sydney, Australia; Tokyo, Japan; Osaka, Japan; Toronto, Canada; Vancouver, Canada; Seattle, Washington; Los Angeles, California; San Francisco, California; Chicago, Illinois; New York, New York; Atlanta, Georgia; Dallas, Texas; and Washington, D.C. The Taxpayer is represented by sales representatives in London, U.K.; Frankfurt, Germany; Stockholm, Sweden; Seoul, Korea; Hong Kong, B.C.C.; Bangkok, Thailand; Taipei, Taiwan; Kuala Lumpur, Malaysia; Pirang, Singapore; Manila, Philippines; Colombo, Sri Lanka; Jakarta, Indonesia; and in South and Central America.

30. As of December 31, 1978 the Taxpayer had 52 full-time employees (2.8% of Taxpayer's full-time employees) employed at the above permanent ticket offices outside of Hawaii, 184 full-time employees (9.9% of Taxpayer's full-time employees) employed on the mainland United States of America or Alaska in connection with its air cargo division described in Paragraph 42 of this Stipulation, 1 employee (0% of Taxpayer's full-time employees) employed in Italy in connection with aircraft subleased in Italy and 1,627 full-time employees (87.3% of Taxpayer's full-time employees) employed in the State of Hawaii.

31. The PSC Tax is measured by the Taxpayer's gross receipts from the air transportation of passengers or freight between airports located within the State of Hawaii, including the Taxpayer's gross receipts from the carriage of persons by air between airports on the islands of the State of Hawaii over international waters, and not by gross receipts from any other source. The PSC Tax is not measured by the Taxpayer's gross receipts from the transportation of passengers or freight (1)

between Hawaii and any other state or country, or (2) between any two points outside the State of Hawaii.

32. As of December 31, 1978, Taxpayer's fleet of aircraft included 29 aircraft (6 owned and 23 leased), 10 of which were used in the Taxpayer's air transportation business in Hawaii, 8 of which were used outside of Hawaii in Taxpayer's U.S. mainland and Alaska air cargo business and 11 of which were leased or subleased by Taxpayer to others outside of Hawaii. As applicable to Taxpayer, the PSC Tax is measured by Taxpayer's gross income (which in Taxpayer's case is gross receipts) from the business of carriage of passengers or freight on Taxpayer's aircraft used in Hawaii and not by gross income from any other source. Taxpayer's 10 aircraft used in Hawaii are in commercial operation solely between airports located in the State of Hawaii, and, for the periods from the conclusion of a day's flights to the commencement of flights on the succeeding day, are located at Honolulu International Airport, Honolulu, Hawaii.

33. Maintenance of and overhaul work on the aircraft used in Taxpayer's business of carriage of passengers or freight between islands of the State of Hawaii is performed in Honolulu by the Taxpayer except for scheduled major overhaul work on engines which is performed in the State of California by an independent contractor, auxiliary power unit overhauls which are performed in the State of Arizona by an independent contractor, selected avionics and electronic equipment overhauls which are performed in the States of California and Arizona by independent contractors, hydraulic pump overhauls which are performed in the State of California by an independent contractor, and certain major airframe checks (which are required periodically but not as often as annually), the most recent of which was performed in California by an independent contractor.

34. Taxpayer does not provide air transportation of passen-

gers between this State and any other state or country.

35. Taxpayer does not derive any gross income from the air transportation of passengers between this State and any other state; except that whenever passengers travel between another state and a destination within this State via another carrier (as far as Honolulu or Hilo) and thereafter via Taxpayer on a common fare ticket, such other carrier pays to Taxpayer a portion of Taxpayer's full fare with respect to the carriage of such passenger between the port of entry and some other destination within the State.

36. Except for Taxpayer's equipment, supplies, offices, bank accounts, real property, personal property and rights to property used in connection with its sales offices outside Hawaii, leased or subleased aircraft by Taxpayer to others, and its air cargo transportation business, all of Taxpayer's aircraft, equipment, supplies, offices, bank accounts, real property, personal property and rights to property necessary or convenient to the operation of Taxpayer's air transportation business are located in Hawaii. As of December 31, 1978, 89.4% of Taxpayer's personal property, on a cost basis is located in Hawaii. Except for the property used in connection with out of state sales offices, leased or subleased aircraft by Taxpayer to others and its air cargo transportation business, all of Taxpayer's property used in connection with its air transportation of passengers business is located in Hawaii.

37. The following is the Taxpayer's tabulation of passengers (and billings in respect of passengers) carried by the Taxpayer during the month of November 1978. The passengers carried by the Taxpayer (and billings) are divided between: (a) those whom Taxpayer carried on the same day that they arrived or departed by a mainland carrier; and (b) those whom Taxpayer carried on any day subsequent to the day of their arrival and prior to the day of their departure.

Total Passengers	Same Day Passengers	Other Day Passengers
322,054	26,409	295,645
(100%)	(8.2%)	(91.8%)
Total Passengers Billings	**Same Day Passengers Billings**	**Other Day Passengers Billings**
$6,837,675.	$404,475.49	$6,433,199.51
(100%)	(5.9%)	(94.1%)
Common Fare Passengers	**Same Day Passengers**	**Other Day Passengers**
154,200	26,409	127,791
(100%)	(17.1%)	(82.9%)
Common Fare Passengers Billings	**Same Day Passengers Billings**	**Other Day Passengers Billings**
$3,273,882.16	$404,475.49	$2,869,406.67
(100%)	(12.35%)	(87.65%)

For purposes of the above tabulation, (i) only passengers on Taxpayer's flights departing within four hours of a flight on another carrier are treated as same day passengers, and (ii) it has been assumed that no passengers purchasing tickets from the Taxpayer or from travel agents in Hawaii were same day passengers.

The following is the Director's tabulation of passengers carried by the Taxpayer on September 20, 1979. The passengers carried by the Taxpayer are divided between (a) those whom Taxpayer carried on the same day that they arrived by a mainland carrier; and (b) those whom Taxpayer carried on any day subsequent to the day of their arrival.

Total Passengers	Same Day Passengers	Other Day Passengers
2759	146 (5.3%)	2613 (94.7%)

Common Fare Passengers	Same Day Passengers	Other Day Passengers
1321	146 (11%)	1175 (89%)

The Director's tabulation does not include the total number of passengers carried by the Taxpayer on this date.

38. Taxpayer does not pay any tax to any other state or country upon its tangible and intangible personal property, including going concern value, except for the taxes in connection with its out of state sales offices and its mainland cargo business and in connection with leased or subleased aircraft by Taxpayer to others. No other state or country taxes Taxpayer upon its tangible and intangible personal property, including going concern value, located in Hawaii.

39. Taxpayer does not pay any tax to any other state upon or measured by Taxpayer's gross income from the air transportation of passengers or freight between airports on islands of the State of Hawaii.

40. Financing statements and security agreements with respect to Taxpayer's aircraft used in Hawaii are filed and recorded in the Bureau of Conveyances, State of Hawaii, and in other states including California, Illinois and New York.

41. Taxpayer was awarded a LOGAIR contract by the United States of America, Department of Defense, Air Force Logistics Air Command, in October 1976. This was a one year contract for scheduled military cargo flights following prescribed United States Air Force routes originating in Georgia. Five Lockheed L-188 Electra freighter aircraft were leased for one year in 1976 to provide this service. Approximately 85 additional employees were utilized in this service.

Revenues from the one year LOGAIR military cargo contract totaled $2,076,000 for the fourth quarter of 1976 and $8,228,000 during the first three quarters of 1977.

42. In February 1978 Taxpayer commenced operation of an air cargo division based at Macon, Georgia. Taxpayer's air cargo division provides contract and occasional use charter cargo services on the mainland United States of America with headquarters and maintenance facilities in Macon, Georgia, and bases at Kansas City, Missouri, and Detroit, Michigan. Taxpayer's air cargo division routes in 1978 included flights between various airports in the United States of America outside of Hawaii. Eight Lockheed L-188 Electra freighter aircraft were purchased or leased under long-term leases during 1978 for use in this operation and are based and operate in states of the United States of America other than Hawaii.

43. Revenues from the Taxpayer's air cargo division, Macon, Georgia totaled $4,338,000 in 1978. The PSC Tax is not measured by such revenues. Taxpayer was awarded an additional LOGAIR contract by the United States of America, Department of Defense, Air Force Logistics Air Command in December 1978.

44. During the period 1973 to 1978, Taxpayer subleased certain of its aircraft to sublessees outside of the State of Hawaii. Seven aircraft are subleased by Taxpayer to others for use on the mainland United States and four aircraft are subleased by Taxpayer to others for use in Italy.

45. During the year ended December 31, 1973, the Taxpayer employed an average of 1,270 persons in Hawaii and mainland operations. During the year ended December 31, 1974, the Taxpayer employed an average of 1,350 persons in Hawaii and mainland operations. During the year ended December 31, 1975, the Taxpayer employed an average of 1,310

persons in Hawaii and mainland operations, of which approximately 1,170 were employed on a full-time basis. During the year ended December 31, 1976, the Taxpayer employed an average of 1,360 persons in Hawaii and mainland operations, of which approximately 1,180 were employed on a full-time basis. During the year ended December 31, 1977, the Taxpayer employed over 1,400 persons in Hawaii and mainland operations, of which approximately 1,300 were employed on a full-time basis. During the year ended December 31, 1978, the Taxpayer employed an average of 1,560 persons in Hawaii and mainland operations, of which approximately 1,420 were employed on a full-time basis.

46. The Taxpayer applied to the CAB in 1978 for several routes that would permit passenger service operations expansion outside of Hawaii. Authority was granted to the Taxpayer in the Honolulu/Seattle/Portland route and in several dormant United States of America transcontinental markets in 1978. Other carriers were also granted similar routes and the Taxpayer decided against entry into these markets in 1978. The Taxpayer was and is a participant in a proceeding at the CAB referred to as the Pacific Low Fare Case which could result in route awards from several mainland cities connecting through Hawaii to points in Asia and the South Pacific.

E. **GENERAL**

47. The foregoing statements may be accepted as facts and all Exhibits referred to and attached are incorporated in this Stipulation by reference and made a part hereof. The facts stated herein were true during each of the years in issue (1973 to 1978) unless specifically stated otherwise.

THIS STIPULATION is without prejudice to the right of either party to contest the relevancy of any fact set forth in this Stipulation and is without prejudice to the right of either party to contest the weight which should be accorded to any fact set forth

in this Stipulation. The parties hereto reserve the right to present additional facts and documents pertinent to the disposition of this cause by additional Stipulations or by testimony of witnesses.

DATED: Honolulu, Hawaii this 4th day of October, 1979.

/s/ Hugh Shearer
/s/ H. Mitchell D'Olier

HUGH SHEARER
H. MITCHELL D'OLIER

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Attorney for Director of
Taxation, Appellee

APPROVED AND SO ORDERED:

/s/ Yasutaka Fukushima

Judge of the above-entitled Court

(Exhibits A-C omitted in printing)

EXHIBIT D

FORM

U-6

(REV. 1978)

PUBLIC SERVICE COMPANY TAX RETURN

1979

Name _____

Address _____

Kind of Business _____

Amount Paid _____

Check No. _____

Date Paid _____

Receipt No. _____

Amount paid with this return $ _____

COMPUTATION OF TAX

PART I.—ONLY FOR PUBLIC UTILITIES TAXED UNDER SEC. 339-204, HRS.

Excess due Line 10 to or Line 5					$
If excess is greater than 15%, show Deficit				$	$
Balance multiplied by 20%—Balance				$ X 20%	$
(Maximum Rate is 4.5%)	(Minimum Rate is 1.65%)			RATE OF TAX	%
Line 5 less Line 1(a) and/or 1(b)		X	%	(Rate shown above)	TAX DUE
Line 1(a)		X	3.35%	(Fixed Rate)	TAX DUE
Line 1(b)		X	5%	(Fixed Rate)	TAX DUE
					TOTAL TAX (1-4 April 20, June 20, Sept. 20, Dec. 20)

PART II.—ONLY FOR PUBLIC UTILITIES TAXED UNDER SEC. 339-204, HRS.

Line 1(a)		X	3.35%	(Fixed Rate)	TOTAL TAX (1-4 April 20, June 20, Sept. 20, Dec. 20)

PART III.—ONLY FOR PUBLIC UTILITIES TAXED UNDER SEC. 339-204, HRS.

Line 1(b)		X	5%	(Fixed Rate)	TOTAL TAX (1-4 April 20, June 20, Sept. 20, Dec. 20)

PART IV.—ONLY FOR AIRLINES, COMMON CARRIERS BY WATER, MOTOR CARRIERS AND CONTRACT CARRIERS TAXED UNDER SEC. 339-4, HRS.

Line 6		X	3%	(Fixed Rate)	TOTAL TAX
Line 6		X	4%	(Fixed Rate)	TOTAL TAX (1-4 April 20, June 20, Sept. 20, Dec. 20)

GROSS INCOME

1.	Total Gross Income from Public Utility Business, except Airlines, Common Carrier by Water, Motor Carrier and Contract Carrier Business (Describe fully from what sources received)	
	(a) Passenger fares for transportation between points on a scheduled route by land	
	(b) Sales of products or services to another public utility for resale to the consumer	
	(c)	
2.	Equipment Rentals Received	
	(a)	
	(b)	
3.	Joint Facility Rentals Received	
4.	Non-Operating Income from Public Utility Business (Describe Fully)	
	(a)	
	(b)	
5.	TOTAL (Lines 1 to 4)	
6.	Total Gross Income from AIRLINE, COMMON CARRIER BY WATER, MOTOR CARRIER OR CONTRACT CARRIER BUSINESS	

DEDUCTIONS

(Deductible only to a Public Utility taxed under Sec. 339-204, HRS.)

7.	Public Utility Expenses (From Schedule A, Page 2)	
8.	Public Utility Business—Uncollectible Bills	
9.	Depreciation on Public Utility Property and Equipment (From Schedule B, Page 2)	
10.	Equipment Rentals Paid (Describe Fully)	
	(a)	
	(b)	
11.	Joint Facility Rentals Paid (Describe Fully)	
	(a)	
	(b)	
12.	Taxes Paid or Accrued (From Schedule C, Page 2)	
13.	All Other Deductions Authorized by Law (Describe Fully)	
	(a)	
	(b)	
14.	TOTAL DEDUCTIONS (Lines 7 to 13)	
15.	NET INCOME for purposes of Chapter 239, HRS. (Line 5 minus Line 14)	

DECLARATION

I declare, under the penalties set forth in Section 231-36, HRS, that this return (including any accompanying schedules or statements) has been examined by me and is, to the best of my knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Hawaii income tax law, chapter 235, Hawaii Revised Statutes, and rules and regulations issued under authority thereof.

_____ _____ _____

_____ _____ _____

SCHEDULE A

1		
2		
3		
4		
5		
6		
7		
8		
	(a)	
	(b)	
	(c)	
	(d)	
	(e)	
	(f)	
	(g)	
	(h)	
	(i)	
9	TOTAL	

SCHEDULE B

Kind of Property	Date Acquired	Cost	Residual Value	DEPRECIATION	
				Prior Years	Year 1970
TOTAL					

SCHEDULE C

	(a)	
	(b)	
	(c)	
	(d)	
TOTAL TAXES PAID OR ACCRUED IN 1970		

Note

Subsection (e) of section 239-5, as enacted by Act 155, L. 1974, provides that the use of tax on the portion of the gross income of a public utility from receipts on the sale of its products or services to another public utility which such products or services shall be one-half of the portion, provided the resale is not made subject to taxation under section 239-5; however, the public utility's exemption from real property taxes imposed by chapter 246 shall be reduced by the proportion that its public utility gross income bears to its total public utility gross income. Whenever the public utility has other public utility gross income, the gross income from the sale of its products or services to another public utility shall be included in applying subsection (e) in determining the rate of tax upon the other public utility gross income.

BALANCE SHEETS

ASSETS	UTILITY DEPARTMENT — END OF TAXABLE YEAR		NON-UTILITY DEPARTMENT — END OF TAXABLE YEAR	
	AMOUNT	TOTAL	AMOUNT	TOTAL
1. Cash				
2. Notes Receivable				
3. Accounts Receivable				
Less: Allowance for Bad Debts				
4. Inventories				
Raw Materials				
Work in Process				
Finished Goods				
Supplies				
5. Investments				
Stocks, Bonds, etc.				
6. Loans				
7. Deferred Charges				
(a)				
(b)				
8. Capital Assets:				
Land and Buildings				
Less: Reserves				
Machinery and Equipment				
Less: Reserves				
Furniture and Fixtures				
Less: Reserves				
Delivery Equipment				
Less: Reserves				
9. Goodwill				
10. Other Assets (Describe Fully):				
(a)				
(b)				
(c)				
(d)				
11. Total Assets in Lines 1 to 10				
LIABILITIES				
12. Notes Payable				
13. Accounts Payable				
14. Accrued Expenses (Describe Fully):				
15. Other Liabilities (Describe Fully):				
16. Reserves, etc. (Describe Fully):				
17. Capital Stock:				
Preferred Stock (Less Stock in Treasury)				
Common Stock (Less Stock in Treasury)				
18. Paid in or Capital Surplus				
19. Retained Earnings				
20. Total Lines 12 to 19				

REMARKS

ANALYSIS OF INCOME AND CHANGES IN SURPLUS

ACCOUNT TITLE	UTILITY BUSINESS	NON-UTILITY BUSINESS
Gross Operating Income (Describe Fully):		
Gross Non-Operating Income:		
Rent from Non-Operating Property		
Miscellaneous Interest Income		
Dividend Income		
Other Income (Describe Fully):		
TOTAL GROSS INCOME		
Operating Expenses (Describe Fully):		
Other Income (Describe Fully):		
TOTAL EXPENSES		
Net Corporate Income		
Paid in or Capital Surplus at Beginning of Period		
Miscellaneous Credits (Describe Fully):		
SUB-TOTAL		
Miscellaneous Debits (Describe Fully):		

EXHIBIT E

STATE OF HAWAII
DEPARTMENT OF TAXATION

Public Service Company Tax Law, Chapter 239,HRS

GENERAL EXPLANATION OF PUBLIC SERVICE COMPANY TAX
and
INSTRUCTIONS FOR FILING FORM U-6

Item 1.

Nature of tax.—The public service company tax is in the nature of a property tax measured by gross income. It is a means of taxing the real property (owned by the public utility or leased to it by a lease under which the public utility is required to pay the taxes upon the property), and the personal property of a public utility, tangible and intangible, including going concern value, and the personal property of an airline, common carrier by water, motor carrier and contract carrier other than a motor carrier, tangible and intangible, including going concern value.

Item 2.

Definition of certain terms used in Chapter 239.—

(a) "Public service company" means a public utility, motor carrier, contract carrier, or common carrier by water.

(b) "Public utility" has the meaning given that term in section 269-1.

(c) "Motor carrier" means a common carrier or contract carrier transporting freight or other property on the public highways, other than a public utility or taxicab.

(d) "Contract carrier" means a person other than a public utility or taxicab which, under contracts or agreements, engages in the transportation of persons or property for compensation, by land, water or air.

(e) "Carrier" means a person who engages in transportation and does not include a person such as a freight forwarder who provides transportation by contracting with others, except to the extent that such person himself engages in transportation.

(f) "Gross income" means the gross income from public service company business as follows: (1) gross income from the production, conveyance, transmission, delivery or furnishing of light, power, heat, coal, water, gas or oil; or

(2) gross income from the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity, by land or water or air:

(i) originating and terminating within this State, or

(ii) by means of vessels or aircrafts having their home port in the State and operating between ports or airports in the State, with respect to the transportation so effected, or

(iii) by means of plant or equipment located in the State, between points in the State, or

(3) gross income from the transportation of freight by motor carriers (other than as stated in (2) above), or the conveyance or transmission of messages or intelligence through wires or cables located or partly located in the State (other than as stated in (2) above). (See item 7 for other lines of business not subject to public service company tax.)

The words "gross income" and "gross income

from public service company business'' shall not be construed to include dividends (as defined by chapter 235) paid by one member of the same group; or gross income from the sale or transfer of materials or supplies, interest on loans, or the provision of engineering, construction, maintenance or managerial services by one member of an affiliated public service company group to another member of the same group. ''Affiliated public service company group'' means an affiliated group of domestic corporations within the meaning of chapter 235, all of the members of which are public service companies. ''Member of an affiliated public service company group'' means a corporation (including the parent corporation) which is included within an affiliated public service company group.

(g) The ''net operating income'' of a public utility subject to the tax imposed by section 239-5(a) is the operating revenues less the operating expenses and tax accruals, including in the computation of such revenues and expenses, debits and credits arising from equipment rentals and joint facility rents. In the event that, but for the provisions of this sentence, deductions could not be had for expenses of services because such services were rendered by the same person or persons constituting the public utility or could not be had for income taxes, because such taxes were levied against the person or persons constituting the public utility in his or their individual capacity and not as a separate entity, there nevertheless shall be allowed as deduction in computing the net income (1) a reasonable allowance for the value of personal services actually rendered, and

(2) such proportion of the actual amount of income taxes, federal and state, as fairly represents the portion of the

income so taxed which was derived from the public utility business. (Schedules A, B and C of Form U-6, page 2, shall be used for determining "net operating income" of a public utility taxed under section 239-5(a).)

(h) "Ports," "airports," or "points in the State" shall be deemed to be such if they are loading, unloading, transshipment, assembly, transfer or relay points.

(i) "Home port" means the place where vessels or aircraft have their tax situs or principal tax situs.

(j) "Public highways" has the meaning defined by section 264-1, HRS, including both state and county highways, but operation upon rails shall not be deemed transportation on public highways.

Item 3.

Time and application of tax.—(a) **General rule.** The public service company tax applies to every public service company (1) which is in business at the commencement of a calendar year, as of January 1 of that year;

(2) which begins business after the commencement of a calendar year, as of the commencement of business.

(b) **Special rules.** (1) Company in business on January 1 but not in business during the preceding calendar year (first year of doing business):

(i) subsection (c) of section 239-9 applies. Under paragraph (2) of subsection (c) the tax is at the rate provided by section 239-5 and 239-6 except that the formula (ratio of the net income to the gross income being in excess of 15%) applicable to utilities subject to section 239-5(a) does not apply.

(ii) under subsection (c) the gross income for the calendar year is estimated and under subsection (e)

it is adjusted by the Tax Director after the close of the year to actual gross income of the company for that year.

(2) Company not in business on January 1, but business is commenced during the calendar year (first year of doing business):

(i) subsection (c) of section 239-9 applies. However, under paragraph (1) of subsection (c) the tax is at the rate of 4%.

(ii) under subsection (c) the tax is paid on the basis of an estimate and under subsection (e) it is adjusted by the Tax Director after the close of the year to the actual gross income of the company for that year.

(3) Company in business on January 1 and also in business during part or all of the preceding year, but not prior thereto (second year of doing business):

(i) subsection (d) of section 239-9 applies. The tax is at the rates provided by sections 239-5 and 239-6 except that the formula (ratio of net income to the gross income being in excess of 15%) applicable to utilities subject to section 239-5(a) does not apply.

(ii) the tax is paid on the basis of an estimate and under subsection (e) of section 239-9 is adjusted by the Tax Director after the end of the second year of doing business so as to be measured by twelve times the average monthly gross income during the period from the commencement of business to the end of the tax year involved.

(4) Company in business on January 1 and also in business during the preceding calendar year and prior thereto (third year of doing business):

(i) subsection (b) of section 239-9 applies.

(ii) the tax return showing the gross income for the

preceding calendar year shall be filed and paid on or before April 20.

Item 4.

Allocation and apportionment.—In the event a public service company is engaged in interstate or foreign commerce and an apportionment of gross income is necessary, section 239-8 provides for an apportionment on the basis of total direct cost of the transportation, conveyance or transmission within the state. "Direct cost" is interpreted to mean and include payroll or labor hired for the handling and transportation of property or persons from the point of origin to the point of destination, payroll taxes attributable to such payrolls, materials used or consumed by the taxpayer in the handling and transportation of property or persons from the point of origin to the point of destination, that portion of any rent on leased equipment which is attributable to the use of such leased equipment in the handling and transportation of property or persons from the point of origin to the point of destination, that portion of depreciation on equipment owned by the taxpayer which is attributable to the use of such equipment in the handling and transportation of property or persons from the point of origin to the point of destination, that portion of the maintenance and upkeep of equipment which is attributable to the use of such equipment in the handling and transportation of property or persons from the point of origin to the point of destination, overland and ocean freight, and insurance.

Item 5.

Acquisition of business of another company.—Subsection (f) of section 239-9 relates to the acquisition by one public service company of the business of another and provides for treating the gross income of the company so acquired the same as if it were

gross income of the acquired company; that is, the gross income to be reported by the acquiring company for the purposes of determining the amount of its tax for the year following the year in which such business was so acquired shall include, in addition to the gross income of the acquiring company during the year ending December 31 preceding, the gross income of the business or part thereof so acquired for such portion of such preceding year.

Item 6.

Consolidation or merger.—Subsection (g) of section 239-9 relates to the consolidation or merger of public service companies and provides that the liability to the tax shall attach to the company thus formed and the company thus formed shall include in its gross income, the gross income of the companies involved in the consolidation or merger.

Item 7.

Who must file Form U-6.—Each public service company shall file Form U-6, showing its taxable gross income for the preceding calendar year. In case any public service company carries on lines of business other than its public service company business, the receipts therefrom shall not be subject to public service company tax, but the same tax liabilities shall attach to such public service company on account of such other lines of business as would exist if no public service company business were done.

Item 8.

When and where Form U-6 must be filed.—Generally, the Public Service Company Tax shall be due on January 1, 1979 and the return must be filed and paid on or before April 20, 1979 to the tax collector for the district within which the principal

office of the public service company is maintained. The public service company may elect to pay the tax in four equal installments, in which case the first installment shall be paid on April 20, 1979, and the second, third and fourth installments on June 20, 1979, September 20, 1979, and December 20, 1979, respectively. If the public service company commenced business after the commencement of the calendar year 1979, the tax shall be payable on or before the twentieth day of the third month after the month in which the company commenced business. (See Item 3(b)(2).)

Note: If any date shown falls on a Saturday, Sunday, or legal holiday, substitute the next regular workday.

Item 9.

Rate of tax for public utilities.—(a) **Part I:** In the case of a public utility generally taxed under section 239-5(a), the rate of tax upon the gross income each year from its public utility business shall be determined as follows: If the ratio of net income of the company to its gross income is 15% or less, the rate of tax is 5.885%. For every 1% increase in the ratio over 15%, there shall be a corresponding increase of .2675% in the rate of tax. (See section 239-9(c) and (d) for exceptions to the above rate formula if a public utility is in its first or second year of operation.) If the gross income is apportioned under section 239-8(b) or (c), the rate of tax shall be 5.885%.

Public utilities taxed under section 239-5(a) shall use Part I of page 1, Form U-6 to compute the tax due. However, it will be necessary to first complete the Schedules on pages 2, 3 and 4 as well as the items of gross income and deductions on page 1 before using Part I.

(b) **Part II:** In the case of a public utility taxed under section 239-5(b) (relating to carriers of passengers by land which

consists in passenger fares on scheduled routes), the rate of tax shall be 5.35%. However, if such carrier has other public utility gross income, the passenger fares nevertheless shall be included in determining the rate of tax upon the other public utility gross income.

Public utilities taxed under section 239-5(b) shall report such public utility gross income on Form U-6, page 1, as item 1(a) and then use Part II of page 1 to compute the tax due. All other items and schedules may be disregarded unless other public utility gross income under section 239-5(a) is involved.

(c) **Part III:** In the case of a public utility taxed under section 239-5(c) (relating to sales of products or services to another public utility which resells such products or services), the rate of tax shall be ½%. However, if such public utility has other public utility gross income, the gross income from the sale of its products or services to another public utility shall be included in determining the rate of tax upon the other public utility gross income.

Public utilities taxed under section 239-5(c) shall report such public utility gross income on Form U-6, page 1, as item 1(b) and then use Part III of page 1 to compute the tax due. All other items and schedules may be disregarded unless other public utility gross income under section 239-5(a) is involved.

Item 10.

Rate of tax for airlines, certain carriers.—Part IV: In the case of an airline, the rate of tax upon the gross income shall be 4%; provided that if an airline adopts a rate schedule for students in grade twelve or below, traveling in school groups, providing such students at reasonable hours, a rate less than one-half of the regular adult fare, the rate of tax

upon the gross income shall be 3%. In the case of a common carrier by water, motor carrier and contract carrier other than a motor carrier, the rate of tax upon the gross income each year shall be 4%.

Airlines, common carriers by water, motor carriers and contract carriers shall report the gross income from such business on Form U-6, page 1, as item 6 and then use Part IV of page 1 to compute the tax due. All other items and schedules may be disregarded.

Item 11.

Exemption from real property taxes.—As provided in section 239-3, a public utility taxed under the public service company tax law shall be exempt from the real property tax law. In order to secure the exemption for periods on or after July 1, 1970, a public utility shall annually file with the tax assessor on or before June 30 preceding the tax year, a return of such property setting forth its claim to the exemption on Form P-7. The claim may include real property under lease to the public utility, under which leases the public utility is required to pay the taxes upon such property, and such claim to exemption shall be determined the same as if the public utility were the owner of such property.

Further, Act 135, L. 1974 (relating to sales of products or services by a public utility to another public utility for resale of such products or services) provides that the public utility's exemption from real property taxes imposed by chapter 246 shall be reduced by the proportion that its public utility gross income under section 239-5(c) bears to its total public utility gross income.

(Remaining exhibits omitted in printing)

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IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal	) CASE NO. 1853
	)
of	) FIRST SUPPLEMENTAL
	) STIPULATION OF
	) FACTS
HAWAIIAN AIRLINES, INC.	)
	)

FIRST SUPPLEMENTAL STIPULATION OF FACTS

In addition to the Stipulation of Facts filed on October 4, 1979 and as an amendment to paragraph 37 thereof, it is hereby stipulated by and between the State of Hawaii, Director of Taxation, by and through the Attorney General of the State of Hawaii, and Hawaiian Airlines, Inc. (hereinafter referred to as the "Taxpayer"), by and through its attorneys, that certain facts in the above-captioned appeal are as follows:

1. The last two paragraphs of Section 37 of the Stipulation of Facts are hereby amended to read in their entirety as follows:

"The following is the Director's tabulation of passengers

carried by the Taxpayer on September 20, 1979. The passengers carried by the Taxpayer are divided between (a) those whom Taxpayer carried on the same day that they arrived by a mainland carrier; and (b) those whom Taxpayer carried on any day subsequent to the day of their arrival.

Total Passengers	Same Day Passengers	Other Day Passengers
2759	146 (5.3%)	2613 (94.7%)

Common Fare Passengers	Same Day Passengers	Other Day Passengers
1321	146 (11%)	1175 (89%)

The Director's tabulation does not include the total number of passengers carried by the Taxpayer on this date. The Director's tabulation assumes that no passengers purchasing tickets from the Taxpayer or from travel agents in Hawaii were same day passengers."

2. During the period 1963 to 1978, the Hawaii Public Service Company Tax under Chapter 239, Hawaii Revised Statutes (hereinafter referred to as the "PSC Tax") was not paid by any airline that provided passenger service between points in the State of Hawaii and points on the mainland United States or in foreign countries. If the Taxpayer commenced the provision of passenger service between points in the State of Hawaii and points on the mainland United States or in foreign countries, the Director would continue to assess the PSC Tax against Taxpayer and such PSC Tax would be measured by a percentage of Taxpayer's gross receipts from inter-island service but not by a percentage of Taxpayer's gross receipts from service between points in the State of Hawaii and points on the mainland United States or in foreign countries. In the event an air carrier that provides passenger service between points in Hawaii and points on the mainland United States or in foreign countries commenced inter-island passenger service between points within

the State of Hawaii, the Director would apply the PSC Tax against such carrier and such PSC Tax would be measured by a percentage of such carrier's gross receipts from such inter-island service.

THIS STIPULATION is without prejudice to the right of either party to contest the relevancy of any facts set forth in this Stipulation and is without prejudice to the right of either party to contest the weight that should be accorded to any facts set forth in this Stipulation. The parties hereto reserve the right to present additional facts and documents pertinent to the disposition of this cause by additional stipulations or by testimony of witnesses.

Dated: Honolulu, Hawaii, this 26th day of October, 1979.

/s/ H. Mitchell D'Olier

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Attorney for Director of
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APPROVED AND SO ORDERED:

/s/ Yasutaka Fukushima

Judge of the above-entitled Court

Office Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-585

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

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STATE OF HAWAII

November 25, 1982

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49 U.S.C. § 1513 ..... passim

Hawaii Revised Statutes § 239-6 ..... passim

Legislative History

Senate Commerce Committee, Airport Development Acceleration Act of 1973, S. Rep. No. 93-12, 93d Cong., 1st Sess. (1973), reprinted in [1973] *U.S. Code Cong. & Admin. News* 1434 8

Standing Committee Report No. 850 on House Bill No. 57, Act 147, 1963 *Senate Journal* 950 (Hawaii) 7

No. 82-585

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

The Appellee Director of Taxation, State of Hawaii, respectfully moves to dismiss or affirm the judgment of the Supreme Court of the State of Hawaii in this case.

QUESTION PRESENTED

Whether a Hawaii tax is a property tax or a gross receipts tax. If it is property tax, it is expressly permitted by 49 U.S.C. § 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. § 1513(a).

ARGUMENT

1. APPELLANT HAS NO RIGHT TO APPEAL UNDER 28 U.S.C. § 1257(2) BECAUSE THE HAWAII TAX UPHELD IS EXPRESSLY PERMITTED BY FEDERAL STATUTE.

49 U.S.C. § 1513 provides, in relevant part, as follows:

"§ 1513. *State taxation of air commerce*

. . . .

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes . . ."

The Hawaii Tax Appeal Court held as follows:

"As the PSC Tax is a property tax, it is expressly allowed under 49 U.S.C. § 1513(b)."

Jurisdictional Statement
App. 23.

The Hawaii Supreme Court held as follows:

"The legislature has deemed the State levy 'a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value.' HRS § 239-6. We would not quarrel with this legislative characterization; the tax has some attributes of a property tax.

. . . .

"The decisions of the Tax Appeal Court are affirmed."

Jurisdictional Statement
App. 16 - 17.

Appellant has no right to appeal because a state tax, expressly permitted by federal statute, is not repugnant to federal law.

2. THERE IS NO FEDERAL QUESTION BECAUSE THIS CASE DOES NOT INVOLVE THE INTERPRETATION OR APPLICATION OF A FEDERAL STATUTE

Appellant claims that the question presented on appeal is whether a state tax is prohibited by a federal statute. The issue before this Court, in determining whether to accept this appeal, is whether Appellant's question requires this Court to determine the nature of a state tax (a state question) or to determine the nature of a federal prohibition (a federal question).

Appellant claims that in order to determine whether the state tax is prohibited, this Court must interpret the federal statute; and therefore, this case involves a federal question.

On the contrary, the federal statute is clear, unambiguous and presents no federal question. It expressly prohibits gross receipts taxes and expressly permits property taxes. 49 U.S.C. § 1513 provides as follows:

"§ 1513. *State taxation of air commerce*

Prohibition; exemption

(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . ."

The federal statute could not be clearer in prohibiting gross receipts taxes and permitting property taxes. The only question is whether the state tax is a tax on property or on gross receipts. Since this question does not involve the interpretation of the federal statute, it is a state question, not a federal question.

For this reason, this appeal should be dismissed on the ground that it does not raise a federal question.

3. THIS CASE STANDS ON ADEQUATE STATE GROUNDS BECAUSE THE QUESTION PRESENTED IS A STATE QUESTION.

The question is whether the Hawaii tax is levied on property or on gross receipts. The federal statute has no relevance to the incidence of the state tax. The federal statute merely permits one tax and prohibits the other. Therefore, the nature of the state tax does not involve federal law.

The Hawaii Tax Appeal Court interpreted state law, not federal law, in determining whether the Hawaii tax is levied on property or on gross receipts.

> "The issue in this case is whether the PSC Tax is levied on gross receipts or on property. If it is levied on gross receipts, it is expressly prohibited by 49 U.S.C. § 1513, and if it is levied on property it is expressly allowed by the same statute.
>
> . . . .
>
> "The PSC Tax is a tax levied on property. All three branches of State government, the legislature, the department of taxation, and the courts have construed the PSC Tax or its predecessor, the public utilities tax, to be a property tax. See S.C.Rep. 850 on H.B. No. 57, Act 157, SLH 1963; Hawaii Tax Information Release No. 1; and *Hawaii Consolidated Railway v. Borthwick,* 34 Haw. 269, 280-281 (1937), affirmed 105 F.2d 286 (construing the public utilities tax).
>
> "This trinity of agreement by the three branches of State government, though not conclusive, has great weight in our determination of the nature and effect of the tax. *Railway Express Agency v. Virginia,* 358 U.S. 434, 440 (1959) (hereinafter *"REA II"*). While this local view is not conclusive on this court, 'it cannot be rejected unless it can be said to be ill

founded.' *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 454 (1918)."

Jurisdictional Statement
App. 21 - 22.

The Hawaii Tax Appeal Court did not interpret the federal statute because it was clear, and discussion or interpretation was not necessary in order to decide the case.

The Hawaii Supreme Court discussed and dispatched with the federal arguments raised by Appellant because those arguments were not addressed in the Hawaii Tax Appeal Court. Although Appellant's federal arguments were insubstantial, the Hawaii Supreme Court addressed those arguments in order to prevent Appellant from appealing subsequent tax years on the ground that those were federal issues raised but not decided in the case. Appellant would benefit substantially by appealing subsequent tax years as the taxes would be deferred until collection.

The Hawaii Supreme Court addressed Appellant's arguments that: (1) the case requires the interpretation of the federal statute, (2) even if the federal statute expressly permits property taxes, its prohibition against gross receipts taxes may be construed to prohibit property taxes as well, and (3) the federal interest in national aviation results in implied pre-emption of all state taxes on aviation.

Those federal arguments are clearly insubstantial and academic where the federal statute expressly and unambiguously sets forth two categories of taxes, one prohibited, the other not. The federal statute is clear, there is nothing to interpret.

For this reason, although the Hawaii Supreme Court addressed federal issues, the resolution of those issues was not material to the decision in the case and the decision was based entirely on state grounds.

4. APPELLANT PRESENTS NOTHING MORE THAN A "LABELING" ARGUMENT MOST RECENTLY REJECTED IN *COMPLETE AUTO TRANSIT, INC. v. BRADY.*

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court held that it would no longer hear the argument that a "magic word or label" could be applied to an otherwise valid tax in order to "disable an otherwise constitutional levy." Such arguments of form over substance serve "only as a trap for the unwary draftsman" and serve "only to distract the Courts and the parties from their inquiry into whether the challenged tax produced results forbidden." at 279, 284 and 285.

In this case, Appellant attempts to label an otherwise valid property tax as a gross receipts tax in orde. to invalidate the tax. This is exactly the type of "labeling" argument that this Court rejected in *Complete Auto Transit.*

5. THIS CASE IS MERELY A NEW VERSION OF *RAILWAY EXPRESS I* AND *RAILWAY EXPRESS II.*

In *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954) (*"Railway Express I"*) and *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959) (*"Railway Express II"*), the issue was whether a Virginia tax was levied on property or on gross receipts. If the tax was levied on property, it was permissible, and if the tax was levied on gross receipts, it was a burden on interstate commerce prohibited by the Commerce Clause.

In *Railway Express I*, this Court held by a 5 to 4 majority that the tax was levied on gross receipts and was therefore prohibited by the Commerce Clause. In *Railway Express II*, this Court considered the same Virginia tax (measured at the same rate of 2-3/20% of gross income), which the Virginia legislature had redrafted to clearly state was a tax levied on property. This Court, by a 7 to 2 majority, held that the defective draftsmanship in the original Virginia statute had been cured. This Court noted that although an invalid tax could not be validated by a magic label,

an otherwise valid levy could be invalidated by a magic label or by an ambiguity in draftsmanship which raised the slightest question as to whether the tax was levied on gross receipts or on some other prohibited incidence.

In *Complete Auto Transit, Inc. v. Brady*, supra, this Court held that it would no longer hear "magic label" arguments to invalidate a tax, but instead would consider only whether a tax, in actual operation and effect, is levied on a prohibited incidence. By this decision, this Court (1) ceased determining the nature of taxes on the basis of draftsmanship, and (2) avoided the problem of invalidating a tax on draftsmanship, only to approve a redrafted version of the same tax with exactly the same economic substance and effect.

In this case, there is no question that the state tax is otherwise valid, except for the claimed ambiguity as to whether the tax is levied on property or on gross receipts. No one questions the fact that the State of Hawaii can levy a property tax against the Appellant, as the federal statute permits it and virtually all of Appellant's property is within the State of Hawaii. Jurisdictional Statement App. 21. If this Court invalidates the Hawaii tax, the Hawaii legislature need only amend the tax to clearly state that the tax is levied on property in order to validate the tax under 49 U.S.C. § 1513(b).

In fact, the Hawaii legislature has already amended the Hawaii tax to clearly state that the tax is a property tax, by an amendment in 1963 patterned after the *Railway Express II* amendment.

> "The purpose of this bill is to place the tax on public utilities, airlines, motor carriers, and contract carriers on a stronger basis from attacks of constitutionality on the commerce clause objections by clearly characterizing the tax as a property tax measured by gross income. Although the present public utility tax is in the nature of a property tax, it is not as clearly defined as a tax in lieu of property tax as is done in this bill." Standing Committee Report No. 850 on

House Bill No. 57, Act 147, 1963 *Senate Journal* 950 (Hawaii).

This Court should not hear this case because (1) it presents only a question of draftsmanship which has little merit, and (2) invalidating the tax would only result in a windfall to the Appellant and the imposition of the same tax in the next legislative session.

6. CONGRESS DID NOT INTEND THAT 49 U.S.C. § 1513 BE APPLIED TO THE HAWAII TAX.

Congress enacted 49 U.S.C. § 1513 to prevent the levy of certain types of state taxes which exposed the interstate airlines to the risk of multiple state tax burdens. The prohibited taxes were those which did not require a substantial jurisdictional nexus and thus could easily be levied by more than one state upon the same airline. The enactment of 49 U.S.C. § 1513 was prompted by *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), where this Court held that every state in which an airline landed could levy a public facilities tax, head tax or gross receipts tax against the airline or its passengers without violating the Due Process or Commerce Clauses. Senate Commerce Committee, Airport Development Acceleration Act of 1973, S. Rep. No. 93-12, 93d Cong., 1st Sess. (1973), reprinted in [1973] *U.S. Code Cong. & Admin. News* 1434, at 1446.

In the present case, Appellant asks this Court to apply 49 U.S.C. § 1513 to a state tax imposed only on intrastate airlines. 49 U.S.C. § 1513 is technically applicable to the Hawaii tax because the federal statute applies to all state taxes imposed on airlines engaged in "interstate air transportation." 49 U.S.C. § 1301(10). Although Appellant flies only within the State of Hawaii, it is considered to be engaged in "interstate air transportation" for purposes of Civil Aeronautics Board jurisdiction because it flies over the international waters between the Hawaiian Islands. 49 U.S.C. § 1301(24) and § 1305(b)(2).

Congress did not intend that 49 U.S.C. § 1513 be applied to the Hawaii tax because the Hawaii tax does not pose the threat of

multiple state tax burdens. The Hawaii tax is levied only on intrastate airlines which no other state has jurisdiction to tax. Appellant does not fly interstate and virtually all of its property is located within the State of Hawaii. Appellant could never be subject to the multiple state tax burdens which 49 U.S.C. § 1513 was enacted to prevent, because, in fact, Appellant is an intrastate airline.

This Court should not decide any issue under 49 U.S.C. § 1513 in this case because this statute was never intended to apply to the Hawaii tax.

7. APPELLANT'S QUESTION IS MOOT BECAUSE CONGRESS RECENTLY AMENDED 49 § 1513 TO SHOW THAT PERMITTED PROPERTY TAXES INCLUDE THE HAWAII TAX.

49 U.S.C. § 1513 was amended on September 3, 1982 by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Title V — Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, reprinted in [1982] Pamphlet No. 7 *U.S. Code Cong. & Admin. News* 380-381. The amendment provides that the "property taxes" permittedby 49 U.S.C. § 1513(b) shall not include property taxes which levy a higher tax burden against airline property than against other similar commercial and industrial property. The amendment further provides that property taxes measured by gross receipts may levy a higher tax burden against airline property so long as the tax is wholly used for airport purposes. The amendment states that "this subsection [prohibiting discriminatory property taxes] shall not apply to an in lieu tax which is wholly utilized for airport and aeronautical purposes." 49 U.S.C. § 1513(d)(3).

The amendment to 49 U.S.C. § 1513 shows that the permitted "property taxes" include "in lieu taxes" or property taxes measured by gross receipts. The Hawaii PSC Tax is clearly such a tax. Therefore the question presented by Appellant has been answered by Congress and is moot.

Although the amendment to 49 U.S.C. § 1513 does not apply to tax years before 1982, it should be noted that the Hawaii tax still qualifies as a permitted property tax under the new amendment. The Hawaii tax is a property tax measured by gross receipts which is used for general state purposes. The Hawaii tax, however, is clearly non-discriminatory as the tax is levied equally upon all Hawaii public service carriers. Hawaii Revised Statutes § 239-6 provides:

> "There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business . . . There shall be levied and assessed upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value. . . ."

This case should be dismissed because the question presented is moot and any question arising under the amended statute is not ripe for adjudication.

CONCLUSION

For the reasons stated above, this appeal should either be dismissed or affirmed.

Respectfully submitted,

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Attorney for Appellee
Director of Taxation,
State of Hawaii

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No. 82-585

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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December 1982

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No. 82-585

IN THE

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October Term, 1982

ALOHA AIRLINES, INC., Appellant
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellant Aloha Airlines, Inc. ("Aloha Airlines") opposes the Motion to Dismiss or Affirm filed by Appellee Director of Taxation, State of Hawaii ("Director"). Most of the subjects touched upon in that motion were discussed in the Jurisdictional Statement previously filed on behalf of Aloha Airlines. Director's motion raises one new item, however, namely the 1982 amendment to the relevant federal statute, 49 U.S.C. § 1513, but his discussion grossly misconstrues the 1982 amendment and, in the process, may leave a distorted picture of the Hawaii state tax system. As a result, Aloha Airlines finds it necessary to comment briefly concerning the 1982 legislation and to observe in addition that the premise of the Director's entire presentation, including his characterization of the 1982 amendment, is based on a plainly mistaken reading of 49 U.S.C. § 1513.

1. THE DIRECTOR'S MOTION IS PREMISED ON AN ERRONEOUS READING OF 49 U.S.C. § 1513.

The Director's misunderstanding of the federal statute is apparent from his statement of the "Question Presented." As stated on page 1 of his Motion to Dismiss or Affirm, he perceives the question to be:

> Whether a Hawaii tax is a property tax or a gross receipts tax. If it is property tax, it is expressly permitted by 49 U.S.C. § 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. § 1513(a).

The Director's characterization of the question is wrong because 49 U.S.C. § 1513 provides no basis for such an "either-or" approach. Subsection (a) of the statute prohibits a State from levying a tax on gross receipts derived from the carriage of persons traveling in air commerce or on the sale of air transportation, an interpretation the Director does not dispute. Contrary to the Director's statement, however, subsection (b) does not "expressly permit" anything termed a "property" tax. Rather, subsection (b) states, in relevant part:

> Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added)

The prohibition stated in subsection (a) is controlling, and nothing in subsection (b) authorizes a State to apply a tax on gross receipts merely by labelling it a "property" tax.

Indeed, the Director's proposed reading of the federal statute would make no sense, since it would exalt the label given to a tax without regard to its actual nature or impact. The Director himself criticizes, at page 6 of his motion, an approach that turns on a "magic word or label." Yet that is precisely what the Director is arguing for. The nature of the Director's misconception is made clear in his statement on page 7 of his motion that the Hawaii legislature could "validate" the tax under 49 U.S.C. § 1513, even if this Court rules here in favor of Aloha Airlines, merely by "amend[ing] the tax to clearly state that the tax is levied on property." Surely Congress could not have intended to make it so easy to evade the federal statute. The Director's view is inconsistent with both the language and the logic of the federal statute, and that is why review and reversal by this Court is necessary.

2. THE DIRECTOR'S DISCUSSION OF THE 1982 AMENDMENT TO 49 U.S.C. § 1513 IS MISLEADING.

On September 3, 1982, 49 U.S.C. § 1513 was amended by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. 97-248, 96 Stat. 324), Title V of which is the Airport and Airway Improvement Act of 1982 (96 Stat. 671-702). The principal change was the addition of a new subsection (d). In addition, the language of subsection (b) was slightly modified to reflect the addition of subsection (d). The full text of 49 U.S.C. § 1513, including the 1982 amendment, is reprinted in the appendix to this brief.

Even the Director concedes, as he must, that the 1982 amendment does not apply to tax years prior to the date of enactment, September 3, 1982. Since this case expressly concerns tax years 1974 through 1977, it simply cannot be true, as the Director asserts, that the question raised by this litigation is "moot." Nor does the 1982 legislation give reason for deeming the question posed here insubstantial, since the interpretation for several prior years (at least 1974 through mid-1982) would remain at issue, with many millions of dollars at stake for Aloha Airlines and for other airlines and States interested in the same question.

More broadly, the Director is simply wrong in the conclusion which he tries to draw from the amendment. It does not, as he claims on page 9 of his motion, "show that permitted property taxes include the Hawaii tax." That view rests on a clear misreading of the federal statute and upon a misleading characterization of Hawaii taxes.

To begin with, in his reading of the 1982 legislation the Director persists in the faulty premise discussed above. Subsection (a) of the statute is entirely unaffected by the amendment, and the relevant language in subsection (b) is unaltered, as well. The relationship between those two provisions, therefore, and in particular the subordination of subsection (b) to subsection (a), remains unchanged. Nothing in the 1982 legislation authorizes a tax on gross receipts which operates under the guise of a "property" label.

Instead, the change in the statute is the addition of subsection (d), which identifies specific State taxes which are forbidden by Congress as unreasonably burdensome on interstate commerce. Subsection (d) does not modify or alter in any way the prohibition against a tax on gross receipts stated in Subsection (a). Indeed, part of subsection (d) might even serve as a second and additional provision to forbid the application of Hawaii's tax in future years. The relevant portion of 49

U.S.C. § 1513(d) states as follows:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> . . .
>
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

As observed in Aloha Airlines' Jurisdictional Statement, page 8, footnote 4, Hawaii does not have a personal property tax today, did not have one in 1962 when the Hawaii tax statute at issue here was enacted, and has not had one since 1947.[1] In comparison with "the tax rate applicable to commercial and industrial property in the same assessment jurisdiction," which is zero, any so-called "property" tax applied to the airlines is obviously larger, so it would seem contrary to the 1982 legislation.

The Director attempts to claim otherwise in his motion by arguing, on page 10, that the Hawaii tax "is clearly non-discriminatory as the tax is levied equally upon all Hawaii public service carriers." But that is the wrong comparison, and the 1982 amendment expressly says as much. The relevant portion of § 1513(d)(2) states:

> (2) In this subsection—
>
> . . .
>
> (D) "commercial and industrial property" means property, *other than transportation property* and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; . . . (emphasis added)

The proper comparison is not with motor carriers, as the Director suggests, but rather with other commercial and industrial property. Since there is no personal property tax applicable to such other property, the application of any tax of this sort on an airline would be

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[1] As was also noted in footnote 4 of the Jurisdictional Statement, the Hawaii public service company tax at issue here is, by its own terms, "in lieu of the tax imposed by Chapter 237 but is not in lieu of any other tax." Haw. Rev. Stat. § 239-6. Chapter 237 is a general excise tax, collected as a percentage of gross income. It is not a personal property tax.

antithetical to the sense of the 1982 amendment. It certainly cannot be justified by it.[2]

CONCLUSION

The Director's motion should be denied, probable jurisdiction should be noted, and the judgment of the Supreme Court of Hawaii should be summarily reversed.

Respectfully submitted,

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December 1982

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[2]The Director's discussion, at page 9, also includes a statement that the 1982 amendment "further provides that property taxes measured by gross receipts may levy a higher tax burden against airline property so long as the tax is wholly used for airport purposes." That interpretation of § 1513(d)(3) is uncertain, but need not be discussed here because it is entirely irrelevant to this case. Any implication of the Director notwithstanding, the revenue from this tax goes to the general fund of the state treasury, and its use is not limited to airport purposes. Hawaii's airports are financed from airport use charges and rentals separate from this tax. Between 1974 and 1977 Aloha Airlines paid use charges totalling approximately $1,367,000.00. (Stipulation of Facts, Record on Appeal to Supreme Court of Hawaii, at 30-31.)

[3]Except for a wholly owned subsidiary, Aloha Airlines, Inc. has no parent companies, subsidiaries, or affiliates.

APPENDIX

49 U.S.C. § 1513

(As amended, September 3, 1982—
1982 additions are in italics)

(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) *Except as provided in subsection (d) of this section,* nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) of this section shall not apply to such authority until December 31, 1973.

(d)(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection–

(A) "assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial and industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

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ALEXANDER

Nos. 82-585 and 82-586

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALOHA AIRLINES, INC., APPELLANT

v.

DIRECTOR OF TAXATION, STATE OF HAWAII

HAWAIIAN AIRLINES, INC., APPELLANT

v.

DIRECTOR OF TAXATION, STATE OF HAWAII

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-585

ALOHA AIRLINES, INC., APPELLANT

v.

DIRECTOR OF TAXATION, STATE OF HAWAII

82-586

HAWAIIAN AIRLINES, INC., APPELLANT

v.

DIRECTOR OF TAXATION, STATE OF HAWAII

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE UNITED STATES

This case presents the question whether the tax imposed by the State of Hawaii on the "gross income" of commercial airlines derived "from the airline business" violates the Federal Aviation Act of 1958, 49 U.S.C. 1513(a), as amended by Section 532 of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 701, which prohibits state taxes "on the sale of air transportation or on the gross receipts derived therefrom." The United States has an interest in the outcome of this case because, in our view, the

Hawaii tax is a flagrant violation of federal law, and if it is sustained the prohibition contained in Section 1513(a) will be rendered ineffective. As we will explain in greater detail, Section 1513(a) was enacted as part of the federal Airport Development Aid Program, under which federal assistance is provided to states and localities for airport improvements. This assistance is drawn from the Airport and Airway Trust Fund, which is in turn replenished by certain federal aviation taxes. Congress enacted Section 1513(a) to prevent excessive taxation of airlines and thus safeguard both the Airport Development Aid Program and the nation's system of civil aviation. Promoting air commerce and the development of an efficient air transportation system have long been important federal objectives (see 49 U.S.C. (Supp. IV) 1302, 1303 and 49 U.S.C. 1346). The Hawaii tax at issue here threatens these goals by imposing a prohibited tax on airlines at a time of general financial distress in the airline industry.

STATUTES INVOLVED

49 U.S.C. 1513, as amended by Section 532 of the Airport and Airway Improvement Act of 1982,[1] Pub. L. No. 97-248, 96 Stat. 701 provides in pertinent part:

> (a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom * * *.
>
> (b) * * * Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those ennumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *.

[1] This Act is Title V of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

This provision is set forth in its entirety in a statutory addendum to this brief.

Section 239-6 of the Hawaii Rev. Stat. (repl. 1976) provides in pertinent part:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a special rate schedule for students * * * the tax shall be three per cent * * *. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [comprising the General Excise Tax law of Hawaii] but is not in lieu of any other tax.

STATEMENT

Appellants are commercial airlines that transport passengers, freight, and mail among several islands in the State of Hawaii but not to any airports outside Hawaii. However, the majority of appellants' passengers begin or end their travel outside Hawaii (82-585 J.S. 3; 82-586 J.S. 3), and the routes of appellants' inter-island flights cross international waters (82-585 J.S. 3, 7; J.S. App. 3, 21;[2] 82-586 J.S. 3-4; 82-586 J.S. App. A-29). Such routes unquestionably bring appellants within the coverage of the Federal Aviation Act of 1958.[3] See *Island Airlines, Inc.* v. *CAB*, 352 F.2d 735 (9th Cir. 1965).

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[2] "J.S. App." refers to the appendix to the jurisdictional statement in No. 82-585).

[3] The Federal Aviation Act of 1958 applies to all "interstate" or "overseas air transportation" and all "interstate" or "overseas air commerce." Sections 101(4), (10), (23)-(24) and 105(b)(2), 49 U.S.C. 1301(4), (10), (23)-(24), and 49 U.S.C. (Supp. IV) 1305(b)(2). See also 82-585 J.S. 7 n.2; 82-586 J.S. 11 n.11.

State taxes "on the sale of air transportation or on the gross receipts derived therefrom" were expressly forbidden by Congress when it enacted 49 U.S.C. 1513 in 1973. Nonetheless, Hawaii's State Director of Taxation continued to assess appellants for the state public service company tax set forth in Hawaii Rev. Stat. § 239-6 (repl. 1976), which has been in effect since 1963. This tax is set at a 3% or 4% of a company's "gross income each year from the airline business."[4] The taxes collected from appellant Aloha Airlines between 1974 and 1977 were approximately $4.2 million (82-585 J.S. 3 n.1); those assessed against appellant Hawaiian Airlines between 1974 and 1979 amounted to $8.89 million (82-586 J.S. App. A-29).

Claiming that the state tax was forbidden by 49 U.S.C. 1513, both appellants protested the assessments and sought refunds. However, the State Director of Taxation rejected appellants' claims, and his decisions were affirmed by the Tax Appeal Court of Hawaii (J.S. App. 4, 25; 82-586 J.S. App. A-33).[5]

Separate appeals by the airlines were consolidated in the Supreme Court of Hawaii. The United States filed a brief as amicus curiae supporting the airlines' contention that the Hawaii tax violated Section 1513 and was therefore invalid under the Supremacy Clause.[6]

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[4] Both appellants are taxed at 3% of their gross income (82-585 J.S. 7 n.2; 82-586 J.S. 4 n.4; A-32.

[5] The Tax Appeal Court also held that appellant Hawaiian Airlines was barred by the three-year state statute of limitations from contesting the assessments for 1974 and 1975, two of the six tax years at issue (82-586 J.S. A-32). The Hawaii Supreme Court did not expressly rely on these grounds for affirmance. In this Court, Hawaiian does not directly address this issue. See *Orr* v. *Orr*, 440 U.S. 268, 274 (1979).

[6] Aloha Airlines additionally contended that the state tax was an undue burden on commerce and thus violated the Commerce Clause. The Hawaii Supreme Court rejected Aloha's contention (J.S. App. 9-11), and Aloha has not raised that issue before this Court.

The Supreme Court of Hawaii affirmed the decisions of the Tax Appeal Court. Stating that appellants' and the government's interpretation of Section 1513(a) would result in "federal preemption of the entire field of commercial aviation taxes," the court reasoned (J.S. App. 9) that the exceptions contained in Section 1513(b) limited "so broad a preemptive sweep" by permitting the continued enforcement of state "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services." The court then purported "to harmonize the seeming contradictions consistently with the purpose of the federal legislation" J.S. App. 9. After examining the legislative history of Section 1513 (J.S. App. 6-9 & n.7), the court identified the congressional purpose as one of insulating from state taxation only the "primary sources" of federal aviation revenues (J.S. App. 15). These "primary" revenue sources, the court stated, were the federal ticket taxes on air passengers and shippers. Since the Hawaii tax was levied upon "public service companies rather than the users of their services" (J.S. App. 16), the court concluded that the Hawaii tax did not "invade" the "area" covered by these federal taxes (J.S. App. 17). Thus, the court asserted, "[t]he object sought by the federal law therefore reveals nothing that would preclude the subjection of Aloha and Hawaiian to" the state tax (J.S. App. 16).

Without flatly declaring that the state tax was a property tax permitted by 49 U.S.C. 1513(b), the court noted that the tax "has some attributes of a property tax," and the court stated that it did not "quarrel with" the Hawaii legislature's characterization of the tax as "'a means of taxing the personal property of the airline * * *'" (J.S. App. 16)[7]

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[7] By contrast, the Hawaii Tax Appeal Court held squarely that the state tax "is a property tax" that 49 U.S.C. 1513(b) "expressly" permits (J.S. App. 23; 82-586 J.S. App. A-32).

In dissent, Justice Marumoto stated that the "plain meaning" of Section 1513(a) prohibited collection of the state tax, "which is based on the gross income of the airlines involved in the instant cases" (J.S. App. 18). "[M]ere characterization" of the tax as a personal property tax, he stated, did not change its "essential nature as a tax 'on the sale of air transportation or on the gross receipts derived therefrom'" *(ibid.)*. Justice Marumoto further observed that Hawaii "has no personal property tax as such" and had none at the time the challenged state tax statute was enacted in 1963 (*ibid.*; J.S. App. 5).

ARGUMENT

The Supreme Court of Hawaii upheld that state's tax on "gross income *** from the airline business" despite the explicit ban in 49 U.S.C. 1513(a) against any state tax "on * * * gross receipts derived" from air transportation. The court did not question the constitutionality of this federal statute, and we know of no plausible grounds for doing so.[8] Instead, ignoring the plain terms of the congressional enactment, the court relied upon what it erroneously viewed as the underlying purpose of the federal statute. The precedent set by that court's decision threatens the fiscal integrity of the federal Airport Development Aid Program (ADAP), which Congress established in 1970, strengthened throughout the 1970's, and renewed in 1982. As appellant Hawaiian Airlines contends (82-586 J.S. 20), the decision below warrants summary reversal.

1. In 1970, Congress enacted two statutes that together established the Airport Development Aid

[8] No party below contended that Section 1513 exceeded the constitutional powers of Congress, and in our view the constitutionality of that provision is beyond dispute. *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979).

Program (ADAP), "a comprehensive program to expand and improve the national airport and airway system over the decade beginning July 1, 1970." *Massachusetts* v. *United States*, 435 U.S. 444, 447 (1978). In the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219,[9] Congress provided for vastly increased federal expenditures for expansion of local airports and federal navigation services. Federal financial assistance to states and localities was to come from the newly created Airport and Airway Trust Fund in the Treasury. To supply and replenish this Trust Fund, new or increased federal taxes on users of civil aviation were enacted by the Airport and Airway Revenue Act of 1970, Pub. L. 91-258, 84 Stat. 236. Of those federal taxes, three were designed to provide "commercial aviation's share of the cost of federal activities." *Massachusetts* v. *United States*, *supra*, 435 U.S. at 451. These consisted of an 8% tax on the price of domestic passenger tickets, a $3 head tax on international travelers emplaning in the United States, and a 5% tax on the cost of air freight (*ibid.*; J.S. App. 7 n.7).[10]

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[9] Sections 2-30 of this Act, as amended, 49 U.S.C. (& Supp. IV) 1702-1730, and as further amended by Section 1102 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 623, were repealed on September 3, 1982. The repealing and superseding legislation is explained, *infra*, at pages 9-10.

[10] These three taxes are found in the Internal Revenue Code of 1954, 26 U.S.C. (& Supp. IV) 4261, 4271, as amended by Sections 203-204 of the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 238. These taxes, which were originally set to expire on June 30, 1980, were extended to September 30, 1980, by Pub. L. No. 96-298, Section 1(b), 94 Stat. 829. Section 280(a)-(b) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 564, they were reinstated as of August 31, 1982, and are now set to expire on January 1, 1988.

After ADAP took effect, this Court held in *Evansville Airport* v. *Delta Airlines*, 405 U.S. 707 (1972), that the Commerce Clause was not violated by $1 state "head charges" that were levied upon emplaning airline passengers and were earmarked under state law for the improvement of aviation facilities. This Court also stated that "[n]o federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance." 405 U.S. at 721.[11]

Misgivings concerning the possible effect of this decision were expressed by Congress. A Senate report, for example, stated that *Evansville Airport* presaged an "inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year." S. Rep. No. 93-12, 93d Cong., 1st Sess. 17 (1973); see also H.R. Rep. No. 93-157, 93d Cong., 1st Sess. 5, 10 (1973); H.R. Rep. No. 93-225, 93d Cong., 1st Sess. 5-6 (1973).

In response to the *Evansville Airport* decision, Congress enacted Section 1513. Speaking in support of Section 1513, Senator Cannon stated that the state aviation taxes prohibited by that provision, if not outlawed, would disrupt ADAP's fiscal structure (119 Cong. Rec. 3349 (1973). When coupled with the federal taxes already in effect, he observed (*ibid.*), the state taxes resulted in a "form of double taxation which we did not intend when, in 1970 we enacted a national system of aviation user taxation." He characterized the 1973 Air-

[11] The Court was aware of ADAP and the 1970 Airport and Airway Development Act and relied on Section 18 of that Act, 49 U.S.C. 1718(a)(8), in support of its holding against federal preemption. See *Evansville Airport* v. *Delta Airlines* 405 U.S. 707, 721 (1972).

port Development Acceleration Act[12] "as an aviation development package, the components of which cannot be separated" (119 Cong. Rec. 3349 (1973)). Thus, he concluded (*ibid.*), if "local taxes on passengers and air carriers are allowed to proliferate nationally, and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program" (*ibid.*).

Throughout the 1970s, Congress strengthened and expanded the federal role in ADAP. ADAP was originally set to expire in 1980,[13] but less than three months ago Congress reinstated that program in revised form and provided for its continuation until the end of fiscal year 1987. See Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Sections 501-532, 96 Stat. 671-702. Under this new enactment, the percentage of federal financial assistance to states and localities has not been reduced and has, in some respects, been increased. See note 12 below. Congress has also reinstated and continued the Airport and Airway Trust

[12] The federal percentage share provided for ADAP project costs is set forth in Section 17 of the Airport and Airway Development Act of 1970, 49 U.S.C. (& Supp. IV) 1717.

Section 5 of the 1973 amendatory Act, Airport Development Acceleration Act of 1973, Pub. L. No. 83-44, 87 Stat. 89, increased the federal share to 75% of ADAP project costs for those airports emplaning less than 1% of all commercial airline passengers each year. The previous limit was 50% for all airports (see H.R. Rep. No. 93-157 93d Cong., 1st Sess. 9 (1973)).

Later amendments eventually raised the federal share to 75% for all airports and to 90% for those airports emplaning less than 1% of all passengers each year. See Airport and Airway Development Act Amendments of 1976, Pub. L. No. 94-353, Section 9(a), 90 Stat. 877; Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, Section 203, 94 Stat. 55. See also 11 FAA, U.S. Dep't of Transp., *Ann. Rep. of Operations under the Airport and Airway Development Act* 13 (Fiscal Year 1980) [hereinafter "1980 FAA Report"].

[13] 1980 FAA Report at 13.

Fund, the fiscal entity responsible for ADAP financing (Section 281, 96 Stat. 565). And Congress has prolonged the federal taxes on airline passenger tickets, international passengers, and freight shipments (Section 280(a)-(b), 96 Stat. 564). Thus, the same fiscal imperatives that originally led Congress to enact Section 1513 remain today. Indeed, Congress recently amended Section 1513 in order to restrict further the permissible scope of state property taxation (Section 532, 96 Stat. 701).[14]

State court decisions such as the present one, unless corrected, will progressively undermine the federal fiscal structure for the funding of civil aviation facilities. The problem posed is neither isolated nor hypothetical. At least five other states have enacted taxes on annual

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[14] The 1982 amendment to 49 U.S.C. 1513 forbids states from assessing airline transportation property at values proportionately higher to true market value than assessed valuations of other commercial and industrial property. It likewise forbids higher ad valorem tax rates. Hawaii has no ad valorem personal property tax either for airlines or other businesses (J.S. App. 18).

Although the 1982 amendment permits taxation of other transactions "in lieu" of ad valorem taxes, this is only on the condition that such tax revenues are "wholly utilized for airport and aeronautical purposes." Here, Hawaii's tax on airline gross income goes to the general fund of the state treasury. Aloha and the State stipulated below that the state's airport financing is derived from airport use charges and rentals independently of any tax, and that between 1974 and 1977 Aloha paid annual use charges to the State ranging from $201,000 to $518,000 (Record on Appeal to Hawaii Supreme Court at 30-31).

airline gross receipts.[15] Appellants note that two cases involving issues similar to this one are pending in an Alaska state court (82-585 J.S. 16; 82-586 J.S. 9 n.9).[16] See also *Air Transportation Association* v. *New York Department of Taxation & Finance*, No. 153 (N.Y. Sup. Ct. June 10, 1982) The recurrent risk of state gross receipts taxation on commercial airlines, therefore, cannot be put to rest until this Court acts to enforce the congressional prohibitions.

The interest of the United States in the outcome of this case is underscored by statutory directives Congress has given to the Secretary of Transportation regarding civil aviation. Section 305 of the Federal Aviation Act of 1958, 49 U.S.C. 1346, requires the Secre-

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[15] Among the states that tax annual gross receipts or gross income without expressly exempting airline gross receipts are:

State	*Tax Rate*	*State Statute*
Delaware	0.4% (of quarterly gross receipts over $1,000)	Del. Code Ann. tit. 30, § 2301(d)-(e) (Cum. Supp. 1980)
Indiana	1.3% (for 1982)	Ind. Code Ann. § 6-2.1-2-3(b) (Burns Supp. 1982)
Maryland	2.5%	Md. Tax & Rev. Code Ann. § 130(a)(1)(1980)
Washington	1.8%	Wash. Rev. Code Ann., §§ 82.16.010(11), 82.16.020(5) (1981 & Cum. Supp. 1982)
West Virginia	3.3%	W. Va. Code § 11-12A-2 (repl. Cum. Supp. 1981)

[16] Decisions of three other state courts have stricken down state taxes on airline gross receipts similar to the tax at issue here. See *State* v. *Cochise Airlines*, 626 P. 2d 596, 600-601 (Ariz. Ct. App. 1981); *Air Transportation Association* v. *New York State Department of Taxation & Finance*, No. 153 (N.Y. Sup. Ct. June 10, 1982); *Allegheny Airlines, Inc.* v. *City of Philadelphia*, 453 Pa. 181, 186, 309 A.2d 157, 159 (1973).

tary to "encourage and foster the development of civil aeronautics and air commerce in the United States and abroad." Section 103(a) of the Act, 49 U.S.C. (& Supp. IV) 1303(a), requires him to consider "as being in the public interest * * * the regulation of air commerce in such manner as to best promote its development and safety * * *." In Section 502(a)(5) of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671, Congress recently directed "all airport and airway programs * * * [to] be administered" in furtherance of this objective. Plainly these goals cannot be met so long as state taxes like Hawaii's continue to be collected. Under Hawaii law, the tax on airline gross income falls due whether the airline realizes profit or loss during the taxing period.[17] Obviously, the federal interest will be frustrated if, year after year, forbidden taxes on gross receipts continue to erode the retained earnings, or ultimately the capital reserves of airlines, while they or their customers are at the same time obligated to provide federal revenues to fund ADAP projects throughout the Nation, including those in Hawaii.[18]

2.The court below disregarded the unambiguous meaning of Section 1513(a), which forbids all state taxes "on the sale of air transportation or on the gross receipts derived therefrom." Because Section 1513(b) lists other permissible state taxes, the court characterized

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[17] Losses are expected for most airlines during 1982's fourth quarter, and the entire period "could be the worst ever for the industry." Byrne, *The Outlook for Airlines Gets Bleaker*, Wall St. J., Oct. 27, 1982, at 35, col. 3.

[18] Between 1971 and September 30, 1980, 22 air-carrier-related ADAP projects were completed in Hawaii aided by $40.154 million of federal funds; seven such projects were then underway in Hawaii aided by an additional $20.853 million of federal funds. During the same period, one general-aviation-related ADAP project had been completed in Hawaii at a cost in federal-aid funds of an additional $274,112. See 1980 FAA Report, *supra*, at 113, 115.

the absolute prohibitions contained in Section 1513(a) as "paradoxical" (J.S. App. 14). The court therefore consulted the legislative history and concluded that Congress did not intend to prohibit taxes such as that at issue here (J.S. App. 15-16). Every step of this reasoning is unsupportable.

First, there is no contradiction, ambiguity, or "paradox" in the statutory scheme. Section 1513(a) does not prohibit all state taxes on covered airlines but only those taxes, fees, head charges or other charges levied "directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." As Section 1513(b) makes clear, other state taxes, including those listed in that provision, are not forbidden. The Hawaii Supreme Court's suggestion that Sections 1513(a) and 1513(b) are somehow inconsistent is plainly incorrect, since the taxes permissible under Section 1513(b) are limited solely to "taxes other than those enumerated in subsection (a)."

Second, the legislative history of Section 1513 does not reveal any congressional intent to restrict the express prohibition against state gross-receipts taxes on air-transport proceeds. The court below assumed that the purpose of Section 1513 was limited to the elimination of state head taxes on airline passengers and users of aviation services (J.S. App. 8 & n.9, 15). While the invalidation of such passenger taxes was one congressional objective described at considerable length, it was by no means the exclusive objective, and the court below cited nothing from legislative history in support of its conclusion that, although taxes on "users of * * * [airline] services" were to be federally proscribed, gross-receipts taxes on airlines were not (J.S. App. 16).

Indeed, the legislative history evidences a congressional purpose to proscribe *both* types of taxes, wheth-

er borne by the airlines or by their customers. The House Subcommittee was specifically made aware of the problems produced by gross-receipts taxes during 1973 hearings when Ohio's deputy tax commissioner described that State's 4% excise tax based on apportioned gross receipts from airline shippers and passengers.[19] To save Ohio's tax, the commissioner requested that the list of permissible state taxes in what is now Section 1513(b) be expanded to include state "privilege or excise taxes" and "state gross receipts taxes fairly apportioned to a State."[20] The House Subcommittee, perhaps persuaded by the objections of the Air Transport Association of America,[21] declined the invitation. It reported out Section 1513 without making any revision to accomodate taxes like Ohio's or Hawaii's (H.R. Rep. No. 93-157, *supra*, at 16). Section 1513 was subsequently enacted in a form virtually identical to the subcommittee bill. Thus, Congress considered a state taxing scheme similar to Hawaii's and deliberately chose not to modify the prohibitions against it.[22]

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[19] *Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R 4182 and S.38 (and all similar bills) Before House Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 246-253 (1973) (hereinafter "*Hearings*").

[20] *Hearings*, *supra*, at 249. In Hawaii, all airline gross income is subject to the 3% or 4% tax. Hawaii has no formula for apportioning taxable gross income to correspond to those segments of appellants' flights crossing State, rather than international, airspace (82-586 J.S. 11 n.11). Thus, even if Ohio's proffered amendment had become law, Hawaii would presumably be in breach of its apportionment requirement.

[21] *Hearings*, *supra*, at 96-101.

[22] The Senate Committee Report (S. Rep. No. 93-12, *supra*, at 17) did not even insinuate that any limitation was intended on Section 1513(a)'s prohibition of state gross-receipts taxes. Similarly, during floor debate Senator Cannon stated (119 Cong. Rec. 3349

The court below also suggested that Hawaii's tax "has some attributes of a [personal] property tax" (J.S. App. 16), apparently because the Hawaii legislature characterized it as such (*ibid.*).[23] The court did not explicitly hold that the tax was a "property tax[]" within the meaning of 49 U.S.C. 1513(b), and therefore, its statement would seem to lack any significance under federal law. Assuming, however, that the court intended to hold that the tax was saved by Section 1513(b), such a holding is unsupportable. As previously noted, Section 1513(b) permits only those "property taxes" not otherwise prohibited by 1513(a). Regardless of how Hawaii labels its tax, its true nature must be tested by reference to 1513(a)'s prohibitory scope and must be resolved as a matter of federal, not state, law. *Chase Manhattan Bank* v. *Finance Administration*, 440 U.S. 447, 449 (1979); *Diamond National* v. *State Equalization Board*, 425 U.S. 268 (1976); *First National Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, 347 (1968). Once this is done, it is indisputable that Hawaii's public service company tax, when viewed in terms of its tax base and its economic incidence, can be

---

(1973); emphasis added): "The bill prohibits the levying of State or local head taxes, fees, *gross receipts taxes or other such charges either on passengers or on the carriage of such passengers in interstate commerce.*"

[23] Even if the legislature's characterization is accepted at face value, other parts of Hawaii's tax statutes reflect the legislature's inconsistency on this point. As dissenting Justice Marumoto observed below, the State has no personal property tax as such (J.S. App. 18). And, by operation of the very terms of Hawaii Rev. Stat. § 239-6 (repl. 1976), the payment of the State's public service company tax on gross income is in lieu of only one other State tax. That tax is levied under Hawaii's General Excise Tax Law, Hawaii Rev. Stat. § 237 (repl. 1976), and is set at 4% of the annual gross income of a "service business." See § 237-13(6). Thus, the airlines' payment of one gross-receipts tax is only in lieu of another gross-receipts tax.

nothing other than a gross-receipts tax forbidden by 1513(a). This Court had not hesitated to invalidate state taxes in cases where the preemptive congressional prohibition was either less explicit or couched in more conditional terms. E.g., *Maryland* v. *Louisiana*, 451 U.S. 725, 747-752 (1981); *Arizona Public Service Co.* v. *Snead*, *supra*, 441 U.S. at 146-151. A fortiori the same result should obtain here.

CONCLUSION

The judgment of the Supreme Court of Hawaii should be reversed.

Respectfully submitted.

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DECEMBER 1982

APPENDIX

FEDERAL STATUTES INVOLVED

Section 1113, by Section 7(a) of the Airport Development Acceleration Act of 1973, Pub.L. No. 93-44, June 18, 1973, 87 Stat. 90, as added to the Federal Aviation Act of 1958 49 U.S.C. 1513, and as amended by Section 532 of the Airport and Airway Improvement Act of 1982, Pub.L. No. 97-248, 96 Stat. 701 states:[24]

Prohibition exemption.

SECTION 1113(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

[24] The additions made by the 1982 amendatory Act are in italics.

Permissible State taxes and fees.

(b) *Except as provided in subsection (d) of this section*, nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Nonapplicability.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply such authority until December 31, 1973.

(d)(1) ***The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting***

for a State or subdivision of a State may not do any of them:

(A) *assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;*

(B) *levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or*

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) *In this subsection—*

(A) *"assessment" means valuation for a property tax levied by a taxing district;*

(B) *"assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;*

(C) *"air carrier transportation property" means property as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;*

(D) *"commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and*

(E) *"State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.*

(3) *This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.*

Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

Nos. 82-585 and 82-586

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ALOHA AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION OF THE
STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF HAWAII

BRIEF OF APPELLANT ALOHA AIRLINES, INC. ON THE MERITS

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QUESTION PRESENTED

Whether a state tax of a specified percentage of an airline's gross income from the airline business, sought to be imposed by the State of Hawaii under Haw. Rev. Stat. § 239-6, is prohibited by 49 U.S.C. § 1513(a), which forbids a state from levying a tax on the gross receipts derived from the carriage of persons traveling in air commerce or on the sale of air transportation, and the supremacy clause of the United States Constitution.

PARTIES TO THE PROCEEDING

On January 10, 1983, this Court ordered that No. 82-585 and No. 82-586 be consolidated. The parties to this consolidated proceeding are Aloha Airlines, Inc. (appellant in No. 82-585), Hawaiian Airlines, Inc. (appellant in No. 82-586), and Director of Taxation, State of Hawaii (appellee in both cases). The United States of America has filed a brief with this Court as *amicus curiae* in support of the position of Appellants, and it had similarly appeared as *amicus curiae* before the Supreme Court of Hawaii. These were all of the parties to the proceedings in the Supreme Court of Hawaii.

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ON APPEAL FROM THE SUPREME COURT OF
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BRIEF OF APPELLANT ALOHA AIRLINES, INC.
ON THE MERITS

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii (with dissenting opinion) is reported at 65 Haw. 1, and 647 P.2d 263. It is reprinted in the Appendix to the Jurisdictional Statement filed by Aloha Airlines, Inc. in No. 82-585 ("Aloha J.S.") at App. 1. The judgment of the Hawaii Supreme Court (Aloha J.S., App. 26) and the decision of the Tax Appeal Court (Aloha J.S., App. 20) have not been officially reported.

JURISDICTION

This action was filed by the appellant, Aloha Airlines, Inc. in order to overturn an assessment against appellant of the Hawaii public service company tax, under Haw. Rev. Stat. § 239-6, on the ground that the assessment is prohibited by a statute of the United States of America, 49 U.S.C. § 1513.

The opinion of the Supreme Court of Hawaii was announced on June 23, 1982, and Judgment was entered in accordance therewith on July 7, 1982. The decision of the Supreme Court of Hawaii upheld the assessment of the Hawaii public service company tax. Notice of Appeal was filed with the Supreme Court of Hawaii on August 6, 1982. Aloha Airlines, Inc. filed its Jurisdictional Statement on October 4, 1982. Probable jurisdiction was noted on January 10, 1983.

The jurisdiction of the United States Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2). In this case the validity of a statute of Hawaii, Haw. Rev. Stat. § 239-6, is drawn into question because of its being repugnant to a law of the United States, 49 U.S.C. § 1513, and the decision of the Supreme Court of Hawaii was in favor of validity of the Hawaii statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The federal and state statutes which are at issue in this case, 49 U.S.C. § 1513(a) and (b) and Haw. Rev. Stat. § 239-6, are set out in full in the Appendix to the Jurisdictional Statement filed by Aloha Airlines, at App. 30. The relevant portions are presented here. 49 U.S.C. § 1513(a) and (b) provide, in relevant part:

> § 1513. *State taxation of air commerce*
>
> *Prohibition; exemption*
>
> (a) No State . . . shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> *Permissible State taxes and fees*
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . .

Haw. Rev. Stat. § 239-6 provides, in relevant part:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students . . . the tax shall be three percent of its gross income each year from the airline business. . . . The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

The Director of Taxation has asserted that 49 U.S.C. § 1513(d), added to the statute in 1982, is relevant to these

proceedings; Aloha Airlines, Inc. asserts that it is not. The full text of 49 U.S.C. § 1513(d) is set out in the Appendix to Appellant's Brief Opposing Motion to Dismiss or Affirm, filed on behalf of Aloha Airlines, at App. 1. The 1982 legislation also modified the language of 49 U.S.C. § 1513(b) slightly by inserting the phrase "Except as provided in subsection (d) of this section," at the beginning. Subsection (b) is quoted above and throughout this brief as it read during the years in question, before the 1982 amendment. There is no substantive difference.

STATEMENT OF THE CASE

Aloha Airlines, Inc.[1] (hereinafter "Aloha Airlines") is a commercial airline which carries persons, freight and mail between various islands of the State of Hawaii.[2] (Joint Appendix, hereinafter "J.A.," 6) Aloha Airlines' flights between these islands cross international waters. (J.A. 11) As a result, Aloha Airlines operates its flights under authority of a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board and is subject to the continuing regulation of the Board. (J.A. 6)

During the four years directly at issue in this case, 1974 through 1977, Aloha Airlines was required under Haw. Rev. Stat. § 239-6 to pay the Hawaii public service company tax, computed as a percentage of its gross income from the airline

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[1] Except for a wholly owned subsidiary, Aloha Airlines, Inc. has no affiliates, parent companies, or subsidiaries.

[2] Aloha Airlines' principal place of business is in Honolulu, Hawaii. However, Aloha Airlines has permanent sales offices located in six other states as well as in Canada and Japan. (J.A. 12) Tickets on Aloha Airlines' flights are sold world-wide in conjunction with tickets on connecting flights of other airlines. Most of Aloha Airlines' passengers are persons whose travel began somewhere outside of Hawaii. (J.A. 7-8)

business.[3] Aloha Airlines timely filed a claim for the refund of the taxes on its gross receipts from the transportation of persons on the basis that such imposition of the public service company tax violated 49 U.S.C. § 1513. The Hawaii Director of Taxation (hereinafter "Director") denied the claim for refund, and Aloha Airlines took an appeal to the Hawaii Tax Appeal Court.

On June 9, 1978 the Hawaii Tax Appeal Court ruled that the imposition of the tax was not prohibited by 49 U.S.C. § 1513. (Aloha J.S., App. 20) Aloha Airlines timely appealed to the Hawaii Supreme Court. Hawaiian Airlines, Inc., another commercial airline with headquarters in Hawaii and the appellant in No. 82-586 before this Court, filed a similar tax appeal. The Aloha Airlines, Inc. appeal and the Hawaiian Airlines, Inc. appeal were consolidated for argument before the Supreme Court of Hawaii. In addition, the United States of America, *amicus curiae*, filed a brief and participated in oral argument with respect to the consolidated appeal. The United States joined both airlines in arguing that the imposition of the tax on the airlines was prohibited by the federal statute.

On June 23, 1982 the Supreme Court of Hawaii entered the opinion which is the subject of this appeal. (Aloha J.S., App. 1) The Hawaii Supreme Court held that the imposition of the public service company tax, Haw. Rev. Stat. § 239-6, was not prohibited by 49 U.S.C. § 1513 or in violation of the supremacy or commerce clauses of the United States Constitution.

In its opinion, the Supreme Court of Hawaii discussed the original purposes of the Airport and Airway Development Act

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[3] The amounts of tax in controversy are $811,565.27 for 1974; $979,243.67 for 1975; $1,071,892.57 for 1976; and $1,367,756.00 for 1977, or a total of $4,230,457.51. (J.A. 6) Interest on the sums paid is also at stake in this litigation. In addition, since the controversy is a continuing one, similar assessments for later years remain in dispute.

of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970), and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970), concluding that the legislation was designed to provide for expansion and improvement of the Nation's airport system financed through a series of user taxes. (Aloha J.S., App. 6) The court further examined the motivation of Congress in passing the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88 (1973), which included the provision primarily at issue, 49 U.S.C. § 1513. The Hawaii Supreme Court concluded that the 1973 legislation was simply motivated by increased revenue needs as well as the fear that the decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), would lead to "a proliferation of similar charges at airports throughout the country." (Aloha J.S., App. 8)

The Hawaii Supreme Court then considered the language of 49 U.S.C. § 1513. The court recognized that "read literally, the subsection [49 U.S.C. § 1513(a)] decrees a federal preemption of the entire field of commercial aviation taxes," but concluded that 49 U.S.C. § 1513(b) "demonstrates that Congress could not have intended so broad a preemptive sweep." The court therefore concluded that its task was to "harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b)." (Aloha J.S., App. 9)

Examining the question of federal preemption of the Hawaii public service company tax, the court stated that "there is no unerring test to determine just when a state provision is without effect by reason of preemption." (Aloha J.S., App. 12) The court relied upon *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), for the proposition that:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

(Aloha J.S., App. 13)

Having concluded that there is no infallible test of preemption, the court determined that legislative intent must be relevant and drew its own inferences as to what Congress had intended to accomplish by enacting 49 U.S.C. § 1513. It concluded that Congress had not intended to preempt any major taxes or primary revenue sources of the states. (Aloha J.S. App. 14-15) Instead, the court concluded that Congress intended primarily to preempt "head" or ticket taxes collected directly from shippers and passengers, those local charges most likely to cause delay or confusion among customers. (Aloha J.S. App., 15-16) Because the Hawaii public service company tax is collected from the airlines, the court concluded that it did not invade the area targeted for prohibition. (Aloha J.S., App. 16)

The court also concluded that the imposition of the Hawaii tax was not incompatible with federal legislation because simultaneous compliance with the federal and state tax laws was not a physical impossibility. Since the airlines could pay both taxes, the court ruled that the federal law did not mandate invalidation of the Hawaii tax. (Aloha J.S., App. 17)

Justice Marumoto filed a dissenting opinion. He concluded that the plain language of the federal statute is controlling under the supremacy clause:

> In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):
>
> > No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom

> prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant cases. (ellipses in original)

(Aloha J.S., App. 18)

Judgment was entered in accordance with this opinion on July 7, 1982. The Notice of Appeal was filed with the Supreme Court of Hawaii on August 6, 1982. Aloha Airlines filed its Jurisdictional Statement to this Court on October 4, 1982. Probable jurisdiction was noted on January 10, 1983.

SUMMARY OF ARGUMENT

1. The imposition of the Hawaii public service company tax, under Haw. Rev. Stat. § 239-6, is contrary to the plain language of 49 U.S.C. § 1513. The federal statute prohibits the collection of a tax "on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." The Hawaii tax, collected as a percentage of "gross income each year from the airline business," falls squarely within the federal prohibition.

2. The decision of the Hawaii Supreme Court rests upon a misunderstanding of the "pre-emption" doctrine. In this case, the intent to displace state authority is explicit, since the federal statute expressly prohibits the states from acting in a certain manner. It was inappropriate, therefore, for the Hawaii court to read the federal statute narrowly on the premise that Congress did not intend to supersede state authority.

3. The legislative history behind 49 U.S.C. § 1513 confirms that Congress intended to prohibit the imposition of this kind of tax by the states. Congress meant to reserve this area exclusively for federal taxation, levied to finance the federal program to aid airport development. In enacting the relevant provision, Congress was aware of an existing gross receipts tax

in at least one other state, yet it resisted pleas to modify the proposed legislation to permit such taxation.

4. The decision of the Hawaii Supreme Court constitutes a serious threat to the important federal policy and program to promote civil aviation and develop an efficient air transportation system.

5. The Director's contention that the Hawaii tax is a permitted property tax is erroneous. The federal statute does not permit the imposition of any and every tax characterized as a "property" tax. Even if so labelled, a tax on gross receipts, such as Hawaii's, is prohibited. Moreover, the Hawaii tax cannot be deemed a property tax for federal purposes or within the meaning of 49 U.S.C. § 1513(b).

6. The Director's argument that the 1982 amendment to 49 U.S.C. § 1513 supports the validity of the Hawaii tax is erroneous. That amendment does not alter the relevant portions of § 1513. If anything, the 1982 legislation demonstrates that Congress did not intend to permit state taxes like Hawaii's and offers an additional ground for barring the tax for years subsequent to 1982.

ARGUMENT

1. THE IMPOSITION OF THE HAWAII TAX ON APPELLANTS IS REPUGNANT TO THE PLAIN LANGUAGE OF THE FEDERAL STATUTE.

At issue here is whether by enacting 49 U.S.C. § 1513, Congress has prohibited the application of a tax such as the one imposed by the State of Hawaii on Aloha Airlines and on Hawaiian Airlines. It is, therefore, the interpretation of a federal statute, 49 U.S.C. § 1513, which is in question.

The first rule of statutory construction is that such an examination must begin with the statutory language. "The starting

point of our inquiry is the plain language of the statute itself." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981).

In this instance Congress has clearly and unambiguously exercised its commerce clause power to prohibit the imposition of any state tax on the gross receipts derived from the sale of air transportation, by providing in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . ., directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* . . . (emphasis added)

The terms "air commerce" and "air transportation" are defined by federal statute and include the operations of Aloha Airlines which are at issue here.[4]

Congress could hardly have been broader or clearer in its prohibition. First, the language forbids every form of state exaction: "a tax, fee, head charge, or other charge." Second, the statute broadly defines what is protected from state taxation, by prohibiting charges (1) on persons traveling, (2) on the

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[4] "Air commerce" is defined to include air carriage between two places within a single state which passes "through the air space over any place outside thereof." 49 U.S.C. §§ 1301 (4) & (23)(a) (1970 & 1982 Supp.). Similarly, "air transportation" is defined to include the transportation of persons and property by air between two places within a single state "through the air space over any place outside thereof." 49 U.S.C. §§ 1301 (10) & (24)(a) (1970 & 1982 Supp.). Aloha Airlines' flights are limited to flights between the islands of Hawaii. Nonetheless, its operations are covered by federal regulation and this statute because those flights pass over the high seas, i.e., the international waters between the islands of Hawaii. See *Island Airlines, Inc. v. Civil Aeronautics Board*, 352 F.2d 735 (9th Cir. 1965). In the Airline Deregulation Act of 1978, Congress confirmed that Hawaii interisland flights constitute "interstate or overseas air transportation," by adopting what is now 49 U.S.C. § 1305(b)(2). *See* H.R. Rep. No. 95-1779, 95th Cong., 2d Sess. 95 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 3773, 3805. The opinion of the Hawaii Supreme Court did not rest on any contrary conclusion.

carriage of persons, (3) on the sale of transportation, and (4) on the gross receipts derived therefrom. Finally, lest there be any gaps, Congress further defined the prohibition broadly, so as to circumvent evasion, by including the phrase "directly or indirectly."

The Hawaii public service company tax is just such a tax levied or collected on the gross revenues derived from the sale of air transportation. Haw. Rev. Stat. § 239-6 provides in relevant part:

> There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business.[5]

The language of § 239-6 is clear. In fact, the Hawaii Supreme Court has confirmed that the public service company tax imposed on "gross income from the airline business," is to be levied and collected on the "gross receipts" from the sale of air transportation. In *In re Aloha Airlines, Inc.*, 56 Haw. 626, 547 P.2d 586 (1976), the Hawaii Supreme Court affirmed a decision of the Tax Appeal Court that "commissions retained by travel agents from *the proceeds of sales of air passage* on Appellant's flights are includable in Appellant's *taxable gross income*." 56 Haw. at 626, 547 P.2d at 586 (emphasis added). There can be no doubt, therefore, that the tax imposed by § 239-6 is levied

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[5] Because Aloha Airlines has adopted a discount rate schedule for school groups as provided in the statute, the tax which the State of Hawaii has attempted to impose upon Aloha Airlines has been three per cent of its gross income each year from the airline business.

and collected on Aloha Airlines' gross receipts from the sale of air transportation.

By virtue of 49 U.S.C. § 1513(b), the Hawaii Supreme Court purported to find "seeming contradictions" within the language of 49 U.S.C. § 1513, allegedly sufficient to require examination of legislative intent and ultimately to open the door for the Hawaii tax. (Aloha J.S., App. 9) No such contradiction actually exists, though, as the language of § 1513(b) clearly does not negate the effect of § 1513(a):

> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added).

It is clear from the statutory language that Congress did not undo the prohibition stated in subsection (a). Rather, Congress merely sought to avoid the possibility that the "directly or indirectly" language in subsection (a) would be taken so broadly as to prohibit any state taxation whatsoever of airlines, as "indirectly" being on their gross receipts. Thus, an airline is not immune from customary real property taxes on land and buildings owned by the airline, merely because the money to pay those taxes would come from its revenues.[6] But taxes enumerated in subsection (a), including taxes levied or collected on the sale of air transportation or the gross receipts derived therefrom, are forbidden in any form or guise.

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[6]The State of Hawaii imposes real property taxes for airport lands upon the airlines under their airport lease agreements. Aloha Airlines or its subsidiaries paid real property taxes with respect to airport system property in the amount of approximately $30,000 for each of the tax years 1974 through 1977 (J.A. 11). These taxes are not contested and are not in dispute here.

The interpretation offered by the Hawaii Supreme Court is, therefore, directly contrary to the plain language of 49 U.S.C. § 1513. Moreover, since the Hawaii Supreme Court's interpretation of subsection (b) of that statute would, in effect, frustrate the provision contained in subsection (a), it violates a second fundamental rule of statutory construction, which is "that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). If a tax which requires Aloha Airlines to pay a levy of three percent of "its gross income each year from the airline business" does not constitute a tax "directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom," then the entire federal statute has been rendered meaningless, inoperative, and insignificant. In the words of the Brief for the United States as Amicus Curiae in Support of Appellants, at pages 1-2, filed in these appeals before probable jurisdiction was noted, "the Hawaii tax is a flagrant violation of federal law."

To date there have been few judicial interpretations of 49 U.S.C. § 1513, and this Court has never reviewed the question at issue here. In certain jurisdictions, state taxing authorities have attempted to assert that state taxes measured by gross receipts are enforceable despite the prohibition of 49 U.S.C. § 1513. Except for this decision of the Hawaii Supreme Court, though, the courts in those states have refused to sustain this kind of tax against challenges based upon 49 U.S.C. § 1513(a).

The State of Arizona attempted to impose a tax of one per cent on the gross proceeds of sales or gross income of companies engaged in the business of transporting passengers or freight by aircraft. In *State v. Cochise Airlines, Inc.*, 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980), the Arizona Court of Appeals held the imposition of the tax on passenger revenue to be prohibited by 49 U.S.C. § 1513(a). In its effort to defend the

tax, the Arizona Department of Revenue presented arguments similar to those underlying the opinion of the Hawaii Supreme Court. Specifically, the state argued that congressional intent was relevant, and that only the "head tax" was the target of the congressional prohibition. 128 Ariz. at 434, 626 P.2d at 598. Further, the state argued that the privilege tax was analogous to a sales tax excepted from 49 U.S.C. § 1513(a) by 49 U.S.C. § 1513(b). 128 Ariz. at 435, 626 P.2d at 599. Nonetheless, the court concluded that the Arizona tax on passenger revenue was barred by the federal statute:

> In our opinion, the plain terms of the federal act strike directly at the subject Arizona privilege tax, and leave no room for a construction which permits a tax on the business of carrying persons.

128 Ariz. at 435, 626 P.2d at 599.

New York has attempted to apply a "franchise" tax applicable to air carriers at the rate of three-quarters of one per cent of gross earnings. In *Air Transport Assn. v. New York State Dept. of Taxation and Finance*, No. 43719 (N.Y. App. Div., 3d Dept., Jan. 20, 1983), the New York tax was challenged on the ground that it was prohibited by 49 U.S.C. § 1513(a). The state argued that "franchise taxes" are authorized by § 1513(b). It further contended that the New York tax was "on" the privilege of doing business, including categories of income other than that protected by § 1513(a), rather than "on" gross receipts derived from air carriage, and therefore was not prohibited. Nevertheless, the New York tax was held to be prohibited by 49 U.S.C. § 1513.[7] The Appellate Division had little difficulty in brushing aside the state's arguments:

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[7]The New York Department of Taxation has filed a notice of appeal from this decision.

> In our opinion, the plain terms of section 1113 of the Federal Aviation Act [49 U.S.C. § 1513] strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation.

Air Transport Assn. v. New York Dept. of Taxation and Finance, slip op. at 3.[8]

It should also be noted that Ohio previously imposed an excise tax, measured as a percentage of gross receipts, on the privilege of engaging in the business of transporting persons or property by air within that state. After the adoption of 49 U.S.C. § 1513, the Attorney General of the State of Ohio rendered an opinion to the state tax commissioner that this tax was prohibited by the federal statute, leading to the legislative repeal of the Ohio tax. See Ohio Rev. Code Ann. § 5745.02 (Baldwin); Ohio Op. Att'y Gen. No. 73-117 (Nov. 20, 1973).[9]

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[8]The New York case was argued and decided after the announcement of the Hawaii decision on appeal here. The New York court was aware of the Hawaii opinion but explicitly rejected its reasoning, citing it as "but see" authority. Slip op. at 4.

[9]See also *Allegheny Airlines, Inc. v. City of Philadelphia*, 453 Pa. 181, 309 A.2d 157 (Pa. 1973), in which the Pennsylvania Supreme Court merely cited the federal statute and struck down an attempt by the City of Philadelphia to impose a flat charge for each passenger embarking at the city's airport.

Litigation is currently in progress in Alaska, *Wien Air Alaska, Inc. v. State of Alaska, Department of Revenue*, State of Alaska, Superior Court Appeal No. 3AN-81-8582 (filed December 10, 1981), and *Alaska Aeronautical Industries, Inc. v. State of Alaska, Department of Revenue*, State of Alaska, Superior Court Appeal No. 3AN-81-4286 (filed June 22, 1981).

In *Air Jamaica, Ltd. v. State Dept. of Revenue*, 374 So.2d 575 (Fla. Dist. Ct. App. 1979), *app. dism.* 392 So.2d 1371 (Fla. 1980), a state sales tax was upheld despite a challenge based upon several grounds, including an argument that 49 U.S.C. § 1513 prohibited the levy. The transaction subject to the tax, however, was the sale to the airlines of prepackaged meals. This appeal does not involve sales of goods to Aloha Airlines. Hawaii has a general excise tax, Haw. Rev. Stat., Ch. 237. Sales of goods to Aloha Airlines are taxable under that chapter and are not in dispute here.

It is natural for any state taxing authority to put forth every conceivable argument and rationale in an attempt to justify a state tax, and the same can be expected here. To date, however, such efforts have failed, except in Hawaii. Other states have recognized that 49 U.S.C. § 1513(a) forbids taxation of this kind. So, too, should this Court hold. The plain language of the federal statute permits no other conclusion.

2. **THE HAWAII SUPREME COURT MISAPPLIED THE "PRE-EMPTION" DOCTRINE IN ENDEAVORING TO READ THE FEDERAL STATUTE NARROWLY.**

In its opinion the Supreme Court of Hawaii purported to interpret the prohibitive reach of 49 U.S.C. § 1513 according to the principles set forth in several decisions of this Court concerning the pre-emption doctrine. The analysis of the Hawaii Supreme Court was fundamentally flawed, however. The decisions which it cited and relied upon involved federal statutes and regulations which did not expressly limit the authority of the state, but rather which implicitly imposed potential conflicts. In those cases, it was necessary to determine whether it was the intent of Congress in each such case to displace the state authority. It was in such context that this Court has observed that it should not be lightly inferred that Congress has intended to pre-empt the state's authority.[10]

The present case poses a different situation, however. Pre-emption may be "either express or implied." *Fidelity Federal Savings and Loan Association v. de la Cuesta,* U.S. , ,

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[10] *See Maryland v. Louisiana,* 451 U.S. 725, 746 (1981); *Schwartz v. Texas,* 344 U.S. 199, 202-03 (1952); and *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). These were the authorities cited to this effect by the Hawaii Supreme Court. (Aloha J.S., App. 13-14.)

73 L.Ed.2d 664, 675, 102 S.Ct. 3014, 3022 (1982). Pre-emption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In this case, the pre-emption is explicit. The federal statute involved, 49 U.S.C. § 1513, prohibits certain state taxation, in so many words. Even by the standard quoted by the Hawaii court, from *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), pre-emption is plain, since the statute constitutes "a clear manifestation of intention" to "supersede the exercise of the power of the state." Indeed, statutory language represents the clearest such manifestation possible.

There is no room here, therefore, for any presumption that Congress did not intend to exercise federal supremacy or for extraordinary efforts to read the federal statute narrowly. That statute does not leave such pre-emption to be inferred; rather, it spells it out precisely. "Absent a 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Albernaz v. United States*, 450 U.S. 333, 336 (1981), quoting *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Thus, when the Court has been presented with cases involving express prohibitions of state taxation, as opposed to allegedly implied pre-emption of state authority, it has applied and enforced the prohibition without reference to the authorities relied upon by the Hawaii court. For example, in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), the issue was whether the New Mexico "electrical energy tax" was barred by 15 U.S.C. § 391, which prohibited any state from imposing a tax on the generation of electricity which discriminated against out-of-state residents. In reaching the conclusion that the New Mexico tax could not be imposed, the Court simply examined the state tax and determined that it was within

the confines of the explicit prohibition stated by Congress in 15 U.S.C. § 391.

Where Congress has, by the language of a federal statute, explicitly prohibited or restricted the authority of the states, its action must be given effect. The application of a presumption in favor of the state statute or of a notion that the federal statute should be narrowly construed violates the supremacy clause of the United States Constitution. The decision of the Hawaii Supreme Court confused this Court's decisions concerning "implied pre-emption" with the more applicable "express prohibition" precedents, thereby failing to give adequate recognition to federal supremacy. The decision of the Hawaii Supreme Court must therefore be reversed.

3. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS INTENDED TO PROHIBIT THE IMPOSITION OF THIS KIND OF TAX BY THE STATES.

As established above, the language of 49 U.S.C. § 1513(a) is plain in prohibiting the application of this tax by the State of Hawaii on Aloha Airlines. Further, that language must ordinarily be deemed conclusive. "When the terms of a statute are unambiguous, our inquiry comes to an end, except in rare and exceptional circumstances." *Howe v. Smith*, 452 U.S. 473, 483 (1981) (citations and internal quotations omitted).

The Hawaii Supreme Court, nevertheless, relied upon its reading of the legislative history to conclude that Congress intended to prohibit only "head" taxes and taxes imposed directly upon the passengers and freight users of the aviation system, rather than taxes imposed on airlines. (Aloha J.S., App. 15-16.) That view cannot be squared with the language in 49 U.S.C. § 1513(a) prohibiting taxation of "the gross receipts derived therefrom;" if Congress meant to forbid only head

taxes it would not have included words which could only refer to the airlines. Nor does the legislative history support the conclusion of the Hawaii court. Indeed, the clear expression of legislative intent is quite to the contrary, for it is plain, from a brief review of this section's history, that Congress intended to forbid the imposition of taxes such as this one.

The relevant history began with the enactment in 1970 of the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970) and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970). These acts were adopted to provide federal assistance in the development and expansion of the nation's airport system. The program was to be primarily financed by a tax of eight per cent of the gross receipts from the sale of domestic passenger tickets, a tax of five per cent of receipts from air freight, and a flat $3.00 tax on each international passenger ticket. See H.R. Rep. No. 601, 91st Cong. 2d Sess. 35-36, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3047, 3082.

It was intended that the 1970 legislation would provide a uniform system of taxation for air transportation with the federal tax being the only tax imposed upon the air transportation system. See Statements of Senators Cannon and Pearson, 119 Cong. Rec. 3349-50(1973). Consistent with that view, the first version of what later became 49 U.S.C. § 1513 was introduced in the House of Representatives a few months later, on January 26, 1971. This bill, H.R. 2337, provided in relevant part that:

> No state . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation . . .[11]

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[11] See Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. 24 (1972).

No action was taken on the bill in 1971, but other bills on the subject were introduced, and in the spring of 1972, Congress began a review of the airport development program which had been created by the 1970 legislation. Shortly after a Senate subcommittee opened hearings on the subject, it was held in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), that states and municipalities were not forbidden from imposing "head taxes" on air passengers or on air carriers.

Congress viewed this possibility as a direct threat to the federal airport and airway program established in 1970 and broadened its review to include the possible effects of *Evansville*. The Senate Committee on Commerce expressed strong concern over the kind of taxation permitted by the *Evansville* decision because it believed such taxes would probably increase the cost and discourage the use of air travel. S.Rep. No. 12, 93rd Cong., 1st Sess. 17-22, *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1446-51. The Senate Committee therefore determined that legislation was necessary to forbid state taxation on the carriage of passengers by air in order to protect a rational program of airport development funded by a uniform federal tax. *Id.* at 1455.

Thus, Congress moved to enact a broad prohibition against state taxation. In question were more than just the "head taxes" discussed in *Evansville*. In congressional hearings Whitney Gillilland of the Civil Aeronautics Board expressed the Board's concerns about a possible proliferation of state and local air transportation taxes and he referred specifically to an Ohio tax

on the gross receipts of an airline business.[12] That Ohio tax, levied on airlines and measured by four per cent of the gross receipts of the airline from the activity, was virtually identical in function and measure of tax to the Hawaii public service company tax, and it was plainly contemplated that the Ohio tax was covered by various bills then under consideration.

A bill introduced a short time thereafter by Senator Cannon, S.3755, expanded the prohibition against state and local taxation specifically to cover state gross receipts taxes on airlines. Section 1113 of the bill provided, in relevant part:

> No state (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or the carriage of persons in air transportation, *or on the gross receipts derived therefrom* . . . (emphasis added)

S. Rep. No. 1005, 92d Cong., 2d Sess. 4 (1972). The "gross receipts" language, added after Mr. Gillilland's testimony noted the Ohio tax on gross receipts, was included for the purpose of expressly barring taxes of that nature.

This bill was considered by the Senate Committee on Commerce on June 28, 1972, and resulted in an amended version of S. 3755, introduced August 1, 1972. This amended version contained language (in § 1113) similar to that which was finally enacted in 49 U.S.C. § 1513, the statute at issue here.

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[12] Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S.2397, S.3302, S.3611 and S.3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong. 2d Sess. 136 (1972) (Statement of Whitney Gillilland); Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong. 2d Sess. 52 (1972) (Statement of Whitney Gillilland).

The language of S. 3755, as amended, was adopted by the Senate-House Conference Committee. H.R. Rep. No. 1543, 92d Cong. 2d Sess. 1-3 (1972). The Senate and the House both passed the bill as reported by the Conference Committee. Ultimately, however, the bill was pocket-vetoed by President Nixon on October 27, 1972, for reasons unrelated to the provision at issue here.

The legislation was taken up again by the 93rd Congress when it convened the following year. The Senate adopted as S. 38 language similar to that which the Conference Committee had agreed upon in 1972. S. Rep. No. 12, 93d Cong. 1st Sess. 6 (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1436.

In the meantime, hearings on the airport development program were held before a House subcommittee in March 1973. At that time, the Ohio gross receipts tax was again specifically examined. Theodore Koetz, Ohio deputy tax commissioner, argued for the fairness of state gross receipts taxes and urged adoption of an exemption from the proposed federal prohibition for certain state gross receipts taxes.[13] Despite this appeal, his proposed language was rejected. In clear recognition that the legislation would bar state gross receipts taxes, and with the intent to do so, Congress passed the proposed legislation. When signed by the President on June 18, 1973, the prohibition became law as 49 U.S.C. § 1513.

Thus, there is no conflict whatsoever between the legislative history of 49 U.S.C. § 1513 and the plain language of the

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[13] Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S.38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong. 1st Sess. 246-53 (1973) (Statement of Theodore Koetz).

statute. Congress meant what it said when it prohibited the imposition of all state taxes on gross receipts from the sale of air transportation. Because the decision of the Hawaii Supreme Court depends on the opposite conclusion, it cannot be sustained.

4. THE DECISION OF THE HAWAII SUPREME COURT CONSTITUTES A SERIOUS THREAT TO AN IMPORTANT FEDERAL POLICY AND PROGRAM.

Before probable jurisdiction was noted, the United States filed a brief as amicus curiae in support of the airlines' positions in these appeals. It summarized, at page 2, the concern which motivated that filing:

> Section 1513(a) was enacted as part of the federal Airport Development Aid Program, under which federal assistance is provided to states and localities for airport improvements. This assistance is drawn from the Airport and Airway Trust Fund, which is in turn replenished by certain federal aviation taxes. Congress enacted Section 1513(a) to prevent excessive taxation of airlines and thus safeguard both the Airport Development Aid Program and the nation's system of civil aviation. Promoting air commerce and the development of an efficient air transportation system have long been important federal objectives (see 49 U.S.C. (Supp. IV) 1302, 1303, and 49 U.S.C. 1346). The Hawaii tax at issue here threatens these goals by imposing a prohibited tax on airlines at a time of general financial distress in the airline industry.

The brief filed on behalf of the United States goes on to explain its concern and the bases for its conclusions in detail. Aloha Airlines agrees with and adopts the discussion therein.

The opinion of the Hawaii Supreme Court did not dispute the power of Congress, under the commerce and supremacy clauses of the United States Constitution, to limit or prohibit this kind of state taxation. Where Congress has determined to do so because it has concluded that a program is important to promote or regulate interstate commerce, it is not for the states to second-guess the congressional determination.

5. THE DIRECTOR'S CONTENTION THAT THE HAWAII TAX IS A PERMITTED PROPERTY TAX IS ERRONEOUS.

In his Motion to Dismiss or Affirm, the Director argued to this Court that the Hawaii public service company tax was a "property tax," and thus was specifically authorized by § 1513(b). That was a ground not relied upon by the Hawaii Supreme Court in its decision. The most that the Hawaii court concluded was that it "would not quarrel" with the legislative characterization of the tax as a tax on personal property, since "the tax has some attributes of a property tax." (Aloha J.S., App. 16.) The Hawaii Supreme Court did not explicitly hold either that the tax was a "property tax" within the meaning of 49 U.S.C. § 1513(b), or that § 1513(b) expressly permits, as argued by the Director, anything characterized as a property tax. Nonetheless, the Director has asserted this justification.

The Director's argument is fatally flawed, in two separate ways. First, his position is based on an erroneous reading of the federal statute, since subsection (b) does not expressly permit the imposition of any and every tax characterized as a "property tax." Second, the Hawaii public service tax is not, for purposes of federal law, a "property tax" as meant by subsection (b). For both of these reasons, the Director's argument must fail.

(a) The Director's position is premised on an erroneous reading of 49 U.S.C. § 1513.

The Director's misunderstanding of the federal statute is

apparent from his statement of the "Question Presented." As stated on page 1 of his Motion to Dismiss or Affirm, he perceives the question to be:

> Whether a Hawaii tax is a property tax or a gross receipts tax. If it is property tax, it is expressly permitted by 49 U.S.C. § 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. § 1513(a).

The Director's characterization of the question is wrong because 49 U.S.C. § 1513 provides no basis for such an "either-or" approach. Subsection (a) of the statute prohibits a state from levying a tax on gross receipts derived from the carriage of persons traveling in air commerce or on the sale of air transportation. The Director has not disputed that interpretation. Contrary to the Director's statement, however, subsection (b) does not "expressly permit" any and every tax termed a "property tax." Rather, subsection (b) states, in relevant part:

> Nothing in this section shall prohibit a State . . . from the levying or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added)

The prohibition stated in subsection (a) is controlling, and nothing in subsection (b) authorizes a State to evade that prohibition merely by labelling a tax on gross receipts a "property tax." Since Hawaii's tax is measured by gross receipts, and since such a tax is enumerated in and forbidden by subsection (a), the rest of subsection (b) is irrelevant.

The same arguments were raised in the state court cases discussed above concerning the similar taxes in Arizona and New York. The Arizona Department of Revenue attempted to justify its tax under subsection (b) as a "sales" tax, while in

New York the tax authorities claimed that their tax was authorized as a "franchise" tax. The courts in those cases had no trouble disposing of those arguments. See *State v. Cochise Airlines, Inc.*, 128 Ariz. at 437, 626 P.2d at 601; *Air Transport Assn. v. New York State Department of Taxation and Finance*, slip op. at 3-4.

(b) **The Hawaii tax cannot be deemed a property tax for federal law purposes.**

Moreover, even if § 1513(b) were interpreted to expressly authorize the imposition of a "property tax," the Hawaii tax at issue here cannot be viewed as a property tax. For purposes of federal statutory interpretation, this Court is not bound by the state's label. Regardless of how Hawaii characterizes its tax, the question of whether the tax comes within the description of § 1513(b) must be resolved as a matter of federal law, not state law, and with particular reference to the purpose of the prohibition of § 1513(a).

While there are no reported cases construing the "property tax" clause of 49 U.S.C. § 1513(b), it is well established in comparable situations that state law is not determinative of the meaning of federal statutory provisions. For example, in *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968), the question arose whether a Massachusetts sales tax was improperly imposed upon a plaintiff national bank as a purchaser of personal property or was validly assessed upon vendors who sold the property to the bank. The *First Agricultural National Bank* opinion noted that the incidence of the tax was a matter of federal law, and stated:

> Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax. *See Society for Savings v. Bowers*, 349 U.S. 143, 151.

392 U.S. at 347. Similarly, see *Chase Manhattan Bank v. Finance Administration*, 440 U.S. 447, 449 (1979); and *Diamond National Corp. v. State Board of Equalization*, 425 U.S. 268 (1976).

This Court is not, therefore, bound to accept the state's characterization of its tax. When the Hawaii public service tax is examined, it is clear that it is not a "property tax," as that term is commonly understood or as is meant in § 1513(b).

The only thing which may be offered to support the characterization of the Hawaii tax as a property tax is its self-description. The Hawaii statute, Haw. Rev. Stat. § 239-6, reads in part:

> The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

That description cannot be taken at face value.

The "property tax" label is clearly a sham to be disregarded for any substantive purpose. This is not a substitute for any generally imposed personal property tax. As observed in the dissenting opinion of Justice Marumoto, Hawaii does not even have a personal property tax at this time, nor did it have one when this statute was enacted. (Aloha J.S., App. 18) Indeed, Hawaii has not assessed a personal property tax since 1947. In addition, the tax referred to as imposed by Chapter 237 is not a personal property tax but rather a general excise tax, collected as a percentage of gross income.

Examination of the legislative history behind § 239-6 reveals that the sole and express purpose of its characterization as a "personal property" tax was to protect the tax from federal constitutional attack. At that time, in 1963, 49 U.S.C. § 1513 had not yet been enacted, so the Hawaii legislature's concern

was with constitutional limitations. The relevant House Finance Committee Report states that:

> The purpose of this bill is to protect from attacks of unconstitutionality on the basis of the commerce clause the tax on . . . airlines . . . by clearly *characterizing* the tax as a property tax, measured by gross income.

H.C. Rep. No. 792 Finance on H.B. No. 57, 1963 House Journal 799 (emphasis added). Similarly, see S.C. Rep. No. 850 Ways and Means on H.B. No. 57, 1963 Senate Journal 950. In the House floor debate preceding final passage of the bill, according to the official record: "Representative McClung explained that the bill would put all taxable business . . . under one tax statute to *get around* the problem of interstate commerce." 1963 House Journal 552 (emphasis added).

The totally artificial nature of the property tax label is confirmed by an examination of the tax returns. The forms prepared by the state and used by Aloha Airlines to file its 1974, 1975, 1976 and 1977 Hawaii public service company tax returns contain no schedule, list or valuation of any property owned by Aloha Airlines. A specimen Hawaii public service company tax return, Form U-6, is shown at J.A. 35. In fact, the filing of the Form U-6 return requires no mention of any property of any kind owned or leased. Item 10 of the "General Explanation of the Public Service Company Tax and Instructions for Filing Form U-6," issued by the Department of Taxation (J.A. 50), provides that airlines shall report gross income on Form U-6, page 1, and compute the tax due—no other information is required. In actual operation, the Hawaii tax purports by its instructions to act and, in fact, does act only to tax gross receipts, and not the property of any airline or other taxpayer.

Under these circumstances, an artificial label cannot be given any weight. In *Galveston, H. & S.A.R. Co. v. Texas*, 210

U.S. 217 (1908), this Court struck down an attempt to validate an unconstitutional tax by the use of a label:

> A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, *by giving the tax a particular name or by the use of some form of words*, can take away our duty to consider its nature and effect.

210 U.S. at 227 (emphasis added). Relying upon this and similar principles, both state and federal courts have repeatedly refused to raise artificial "property tax" labels to the level of substance.[14]

The whole point of 49 U.S.C. § 1513 is to preclude state and local governments from imposing certain taxes, including gross receipts taxes, upon air transportation. It would make no sense to permit Hawaii to impose a tax with exactly the same effect, merely because it was styled as a "property" tax rather than as a "gross receipts" tax. Surely Congress could not have intended to make it so easy to evade the federal statute. The Hawaii public service company tax cannot, therefore, be sustained as a property tax.

---

[14] See, e.g., *Weaver v. Prince George's County*, 281 Md. 349, 379 A.2d 399 (1977); *Tower Plaza Investments, Ltd. v. DeWitt*, 109 Ariz. 248, 508 P.2d 324 (1973), *app. dism.*, 414 U.S. 1118 (1974); *Apache Gas Products Corp. v. Oklahoma Tax Commission*, 509 P.2d 109 (Okla. 1973); *H & B Communications Corp. v. Richmond*, 79 Wash.2d 312, 484 P.2d 1141 (1971); *State v. Minneapolis and St. Louis Railway Co.*, 257 Minn. 124, 100 N.W.2d 669 (1960); *Penn Mutual Indemnity Co. v. Commissioner*, 277 F.2d 16 (3rd Cir. 1960); and *California Co. v. State*, 141 Colo. 288, 348 P.2d 382 (1959), *app. dism.*, 364 U.S. 285 (1960).

6. THE DIRECTOR'S ARGUMENT THAT THE 1982 AMENDMENT TO 49 U.S.C. § 1513 SUPPORTS THE VALIDITY OF THE HAWAII TAX IS ERRONEOUS.

On September 3, 1982, 49 U.S.C. § 1513 was amended by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. No. 97-248, 96 Stat. 324), Title V of which is the Airport and Airway Improvement Act of 1982 (96 Stat. 671-702). The principal change was the addition of a new subsection (d). In addition, the language of subsection (b) was slightly modified to reflect the addition of subsection (d). The full text of 49 U.S.C. § 1513, including the 1982 amendment, is reprinted in the appendix to Appellant's Brief Opposing Motion to Dismiss or Affirm, filed by Aloha Airlines, at App. 1.

The Director has argued that this amendment renders this case moot, and that the amendment supports the Director's contention that the Hawaii tax is not prohibited by 49 U.S.C. § 1513. See Director's Motion to Dismiss or Affirm, at 9.

Even the Director concedes, as he must, that the 1982 amendment does not apply to tax years prior to the date of enactment, September 3, 1982. Since this case expressly concerns tax years 1974 through 1977, it simply cannot be true, as the Director asserts, that the question raised by this litigation is "moot."

More importantly, the 1982 amendment provides no support for the validity of the Hawaii tax. To begin with, neither 49 U.S.C. § 1513(a) nor the relevant language in § 1513(b) are affected by the amendment. The relationship between those two provisions, therefore, and in particular the subordination of subsection (b) to subsection (a), remains unchanged. Nothing in the 1982 legislation authorizes a tax on gross receipts, whether or not characterized for any purpose as a "property" tax.

Instead, the change in the statute is the addition of subsection (d), which identifies specific state taxes which are forbidden by Congress as unreasonably burdensome on interstate commerce. Subsection (d) does not modify or alter in any way the prohibition against a tax on gross receipts stated in subsection (a).

Indeed, part of subsection (d) might even serve as a second and additional provision to forbid the application of Hawaii's tax in future years. Subsection (d) adds a prohibition against certain "ad valorem" property taxes which might have been permissible prior to the date of the 1982 amendment.[15] The relevant portion of 49 U.S.C. § 1513(d) states as follows:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them: . . .
>
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

As noted above, Hawaii does not have a personal property tax today, did not have one in 1963 when the Hawaii tax statute at issue here was enacted, and has not had one since 1947. In comparison with "the tax rate applicable to commercial and

---

[15] Actually, whether or not the Hawaii tax could for any purpose be deemed to be a property tax, it could not be deemed to be an "ad valorem" property tax, as no property valuation is involved in the determination of the tax. For discussions of what constitutes an "ad valorem" property tax, see generally *United States v. County of Allegheny*, 322 U.S. 174, 184 (1944); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 447 (1940) (Roberts, J., dissenting); *Virginia v. Imperial Coal Sales Co., Inc.*, 293 U.S. 15, 18 (1934).

industrial property in the same assessment jurisdiction," which is zero, any so-called "property" tax applied to the airline is obviously larger, so it would seem contrary to the 1982 legislation.

The Director has claimed otherwise by arguing in his motion, at page 10, that the Hawaii tax "is clearly nondiscriminatory as the tax is levied equally upon all Hawaii public service carriers." But that is the wrong comparison, and the 1982 amendment expressly says as much. The relevant portion of § 1513(d)(2) states:

> (2) In this subsection— . . .
>
> (D) "commercial and industrial property" means property, *other than transportation property* and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy . . . (emphasis added)

The proper comparison is not with motor carriers, as the Director has suggested, but rather with other commercial and industrial property. Since there is no personal property tax, the application of any tax of this sort on an airline would seem antithetical to the 1982 amendment.

More importantly, for the present case, it is plain that the thrust of the 1982 legislation is contrary to the Hawaii tax. The addition of subsection (d) indicates that what Congress had in mind when it included "property tax" within the terms of subsection (b) was a traditional ad valorem tax, not a tax measured by gross receipts like Hawaii's. Further, it demonstrates that Congress intended to permit only those property taxes which treated airlines like other businesses generally, not one which singles them out for taxation, like Hawaii's. Far from justifying the imposition of the Hawaii tax, then, the 1982 legislation strengthens the case against it.

CONCLUSION

The interpretation of 49 U.S.C. § 1513 offered by the Supreme Court of Hawaii is contrary to the plain language of that statute and vitiates it. The decision is contrary to the legislative history of the federal statute at issue and puts in jeopardy the important federal program to promote civil aviation. The decision of the Supreme Court of Hawaii must be reversed.

Respectfully submitted,

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NOS. 82-585 and 82-586

IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF HAWAII, Appellee.

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OF THE STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

BRIEF
FOR APPELLANT HAWAIIAN AIRLINES, INC.

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QUESTION PRESENTED

Whether a state tax of a specified percentage of gross income from the airline business violates a provision of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513) that prohibits states from levying a tax, directly or indirectly, on gross receipts derived from the carriage of persons traveling in air commerce or the sale of air transportation.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Hawaii Supreme Court were Hawaiian Airlines, Inc. and the Director of Taxation of the State of Hawaii. This proceeding was consolidated in that court with *In the Matter of the Tax Appeal of Aloha Airlines, Inc.* (Hawaii Supreme Court Case No. 7078). The parties to the latter proceeding were Aloha Airlines, Inc. and the Director of Taxation of the State of Hawaii.

The United States of America appeared in the Hawaii Supreme Court as amicus curiae and filed briefs as amicus curiae in the Hawaii Supreme Court and in this Court prior to consideration of the Jurisdictional Statements herein in support of the position of Hawaiian Airlines, Inc. and Aloha Airlines, Inc.

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NO. 82-585
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OPINIONS AND JUDGMENTS BELOW

The opinion of the Hawaii Supreme Court (J.S. App. A-1)[1] and dissenting opinion (J.S. App. A-26) are reported at 65 Haw. 1, 647 P.2d 263 (1982). The judgment of the Hawaii Supreme Court (J.S. App. A-35) and the decision and judgment of the Hawaii Tax Appeal Court (J.S. App. A-28) are not reported.

[1] "J. S. App." refers to the appendix to the Jurisdictional Statement in No. 82-586.

JURISDICTION

The judgment of the Hawaii Supreme Court (J.S. App. A-34), sustaining the validity of the public service company tax imposed on airlines by Hawaii Revised Statutes Section 239-6 against a challenge based on the Constitution (Article VI, [illegible]se 2) and laws (49 U.S.C. § 1513(a)) of the United States, was entered on July 7, 1982. The notice of appeal (J.S. App. A-37) was filed with the Hawaii Supreme Court on August 6, 1982. Timely docketing of this appeal was effected on October 4, 1982, which date is within ninety days after the Hawaii Supreme Court's entering of judgment as required by 28 U.S.C. § 2101(c). Probable jurisdiction was noted by this Court on January 10, 1983. The time for filing this brief was extended on February 8, 1983 to March 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 7(a) of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, reads, in part:

> State Taxation of air commerce
>
> Prohibition; exemption
>
> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> Permissible State taxes and fees
>
> (b) [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes,

> net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . .[2]

Hawaii Revised Statutes Section 239-6 reads, in part:

> **Airlines, certain carriers.** There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students . . ., the tax shall be three per cent of its gross income each year from the airline business . . . .

The Supremacy Clause of the United States Constitution (Article VI, clause 2) reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant statutory provisions at issue here are set forth in full in Appendix A to this brief.

STATEMENT OF THE CASE

The question in this case is whether a statute of the State of Hawaii (HAW. REV. STAT. § 239-6) which levies a tax of a specified percentage of the gross income of airlines carrying passengers between islands of the State of Hawaii is prohibited by a provision of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513) and the Supremacy Clause of the

[2]The statute is quoted as amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 701. As explained hereinafter (*infra* at 27-30), the changes to 49 U.S.C. § 1513 effected thereby are relevant herein only as a reconfirmation of Congressional intent to prohibit the taxes enumerated in 49 U.S.C. § 1513(a).

United States Constitution. The material facts are not in dispute.

Hawaiian Airlines, Inc. ("Appellant")[3] is a commercial airline that carries passengers, property and mail between islands of the State of Hawaii. (J.A. 14-16). All of Appellant's regularly scheduled flights pass over international waters. (J.A. 27). Appellant operates under a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board ("CAB") and is authorized to carry and does carry United States Mail under that certificate. (J.A. 16). Appellant also is subject to regulation by the CAB. *(Id.)* For the period 1974-1978, more than 60% of Appellant's passenger gross receipts were realized from passengers traveling to and from Hawaii on other carriers from points outside of Hawaii. (J.A. 24-25). Appellant maintains 13 permanent ticket offices outside of Hawaii. (J.A. 28).

As an airline operating between airports in the State of Hawaii, Appellant is subject to the Public Service Company Tax imposed by Hawaii Revised Statutes Section 239-6 (the "PSC tax"). The PSC tax is computed as a percentage of Appellant's gross income each year from its airline business.[4]

In 1978, Appellant filed amended PSC tax returns seeking refunds of all PSC taxes paid in calendar years 1974 through 1978 on its gross receipts from the transportation of passengers

[3]Appellant has no parent or affiliate companies. Appellant has no subsidiary companies other than wholly-owned subsidiaries.

[4]HAW. REV. STAT. §§ 239-2, 239-6 (1976 & Supp. 1982). The PSC tax rate is four percent, or three percent in the case of an airline adopting a special rate schedule for carriage of students. Appellant has adopted the statutory special rate schedule and thus the PSC tax assessments at issue herein were three percent of Appellant's gross income. The PSC tax assessments herein "are measured by the Taxpayer's gross receipts from the carriage of passengers by air between airports on islands of the State of Hawaii, over international waters." Stipulation of Facts in the Hawaii Tax Appeal Court ¶ 5. (J.A. 15-16).

on the ground that such taxes are prohibited by 49 U.S.C. § 1513 and the Supremacy Clause of the United States Constitution. The Hawaii Director of Taxation summarily denied Appellant's claim for refund and Appellant perfected a timely appeal to the Hawaii Tax Appeal Court.[5]

The Tax Appeal Court ruled that the PSC tax was not prohibited by 49 U.S.C. § 1513.

Appellant perfected a timely appeal to the Hawaii Supreme Court. The principal issue argued and briefed before the Hawaii Supreme Court was whether the PSC tax was prohibited by 49 U.S.C. § 1513 and the Supremacy Clause. The Hawaii Supreme Court affirmed the judgment of the Tax Appeal Court.

The Hawaii Supreme Court reviewed the legislative background of the Airport Development Acceleration Act of 1973 (the "1973 Act") before turning to the language of the statute itself. The court observed that two acts of Congress that preceded the 1973 Act were passed to expand and improve the nation's airport and airway system.[6] The court noted that:

> [t]he Development Act declared a Congressional policy to increase federal expenditures for the foregoing purpose and the Revenue Act was designed to provide the means for implementation. (J.S. App. A-10).

The court pointed out that, to finance the desired expansion and improvement of the national airport and airway system, certain taxes were increased and others imposed, and a trust fund was established as a repository of the revenue collected. The court also noted that Congress was reconsidering this

[5]The Hawaii Director of Taxation subsequently assessed Appellant for PSC taxes for calendar year 1979. Appellant also appealed this assessment to the Tax Appeal Court, and the two tax appeals were consolidated.

[6]The two acts were the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, tit. I, 84 Stat. 219 and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, tit. II, 84 Stat. 236.

statutory scheme in its deliberations on the 1973 Act, due to the need to increase funding of the system and to prohibit certain taxes.

The Hawaii Supreme Court commenced its statutory analysis by conceding that the PSC tax is literally prohibited by subsection (a) of 49 U.S.C. § 1513:

> Read literally, the subsection [subsection (a) of § 1513] decrees a federal preemption of the entire field of commercial aviation taxes. (J.S. App. A-13.)

But the court next asserted that subsection (b) of § 1513 "demonstrates that Congress could not have intended so broad a preemptive sweep." *Id.* According to the court, this was the case because subsection (b):

> permits the levy and collection of state and local taxes *other than those enumerated in subsection (a)* . . ., including property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services. (J.S. App. A-13, emphasis added.)

The Hawaii Supreme Court's interpretation of 49 U.S.C. § 1513, then, is based on a premise that there are "seeming contradictions" between subsections (a) and (b) of 49 U.S.C. § 1513 and thus:

> Our task then is to harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b). (J.S. App. A-14.)

This "seeming contradictions" premise led the court to a four step examination of whether 49 U.S.C. § 1513 evidenced a "clear and manifest purpose of Congress" to displace state law, a finding of which the court believed necessary to permit 49 U.S.C. § 1513 to displace the PSC tax under the Supremacy Clause of the United States Constitution. (J.S. App. A-18.)

The first step in the examination was a reiteration of the "seeming contradictions" premise. As a second step, the court resorted to the legislative history of 49 U.S.C. § 1513 and determined, by interpretation of selected portions thereof, that the object of 49 U.S.C. § 1513 was merely to preclude state taxes (such as head taxes) imposed on passengers and other users of the aviation system but not taxes on airlines. This step was necessary because an inference of "a pervasive federal scheme . . . barring the collection of all State taxes touching air transportation" could not be drawn by the court due to its "seeming contradictions" premise. As step three, the court reviewed the PSC tax and its legislative history and concluded that the PSC tax was imposed on airlines, not on passengers or other users of the aviation system. Fourth and finally, the court necessarily concluded that there was no irreconcilable conflict between the federal prohibition and the PSC tax and, therefore, that the PSC tax was not prohibited by 49 U.S.C. § 1513 and the Supremacy Clause.

The court also noted its agreement with the Hawaii Legislature's characterization of the PSC tax as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value" (HAW. REV. STAT. § 239-6) and that the PSC tax has "some attributes" of a property tax, but stopped short of holding, as the Hawaii Tax Appeal Court had held (J.S. App. A-30), that the PSC tax was a property tax.

The dissent succinctly disagreed with the majority's holding that the PSC tax was not prohibited, as follows:

> In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):
>
> > No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom . . .

prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant case.

U.S.C. § 1513(b) provides: "Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes . . .", and HRS § 239-6 provides: "The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value, and is in lieu of the tax imposed by chapter 237 [General Excise Tax Law] but not in lieu of any other tax."

I do not think that mere characterization of the tax as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value," changes the essential nature of the tax as a tax "on the sale of air transportation or on the gross receipts therefrom."

At the present time, the State of Hawaii has no personal property tax as such, and there was none at the time HRS § 239-6 was enacted.

Under HRS § 239-6, the sole basis for determining the amount of the levy or collection is the gross income from the airline business. Such basis has no relationship to the value of the personal property used in the airline, tangible and intangible, including the going concern value. (J.S. App. A-26.)

SUMMARY OF ARGUMENT

1. 49 U.S.C. § 1513 clearly and unambiguously prohibits the imposition of taxes such as the PSC tax "on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." This prohi-

bition applies both to subjects of state taxation (*i.e.*, persons traveling in air commerce, carriage of persons traveling in air commerce, sale of air transportation) and to a measure of state taxation (gross receipts derived from such activities). The PSC tax on gross income from the airline business is levied "directly or indirectly" on the prohibited subjects (persons traveling in air commerce or the carriage of persons traveling in air commerce or the sale of air transportation) and on the prohibited measure (*i.e.*, the gross receipts derived from such activities) and, therefore, is prohibited by subsection (a) of 49 U.S.C. § 1513. Subsection (b) of 49 U.S.C. § 1513 unmistakably defers to subsection (a) of such section, so that taxes permitted by subsection (b) are limited to taxes "other than those enumerated in subsection (a)." Since the PSC tax is "enumerated in subsection (a)", it is not permitted by subsection (b). The decision below disregards this plain meaning of 49 U.S.C. § 1513.

2. The legislative history of 49 U.S.C. § 1513 confirms that Congress intended to prohibit state taxes on gross receipts of airlines such as the PSC tax.

3. 49 U.S.C. § 1513 was enacted by Congress as a part of a national system of taxation and support of airport and airway development. The concept was to provide funds for such development through taxation and protection of the funding base through taxing prohibitions, all in the interest of an economically viable and safe national air transportation system. The decision below disrupts this national system.

4. The amendment of 49 U.S.C. § 1513 by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 reconfirms Congress' commitment to the national system of airport and airway development of which 49 U.S.C. § 1513 is a part and the careful balancing of federal and state interests inherent therein, thereby confirming the prohibition of state taxes such as the PSC tax by 49 U.S.C. § 1513.

ARGUMENT

1. THE HAWAII DECISION IGNORES THE PLAIN MEANING OF 49 U.S.C. § 1513.

The starting point in determining the meaning of a federal statute is the language of the statute itself. *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981). The language of 49 U.S.C. § 1513 prohibits the PSC tax.

Subsection (a) of 49 U.S.C. § 1513 ("Subsection (a)") prohibits the levy or collection by any state of

> a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .

The broad sweep of the language of the statute is significant. It applies to all conceivable governmental exactions (*i.e.*, to taxes, fees, head charges and other charges). It broadly defines the categories of exactions forbidden. By its terms, no tax, fee or charge may be imposed on "persons traveling in air commerce," "the carriage of persons traveling in air commerce," "the sale of air transportation," or "the gross receipts derived

therefrom."[7] Taxes either "directly or indirectly" on such persons, carriage, sale or gross receipts are prohibited. Subsection (a) thus prohibits both subjects (*i.e.*, persons traveling in air commerce, the carriage of persons traveling in air commerce, and the sale of air transportation) and a measure (*i.e.*, gross receipts derived from persons traveling in air commerce, the carriage of persons traveling in air commerce or the sale of air transportation) of state taxation. The clear and unambiguous language of Subsection (a) provides more than ample justification for the statement of the court below that

> [r]ead literally, the subsection decrees a federal preemption of the entire field of commercial aviation taxes. (J.S. App. A-13.)

The language of Subsection (a) prohibits the PSC tax in several ways. The PSC tax is prohibited as a tax "directly or indirectly" on persons traveling in air commerce, the carriage of persons in air commerce or the sale of air transportation. The PSC tax is further prohibited as a tax "directly or indirectly" on

[7] *See* 49 U.S.C. §§ 1301(4), 1301(23)(a) (1976 & Supp. IV 1980) ("air commerce" defined for purposes of 49 U.S.C. § 1513 to include certain intrastate air carriage as well as the carriage of persons and property by air between places within any state "over any place outside thereof"); 49 U.S.C. §§ 1301(10), 1301(24)(a) (1970 & Supp. 1982) ("air transportation" defined for purposes of 49 U.S.C. § 1513 to include the transportation of persons and property by air between places within any state "over any place outside thereof"); Island Airlines, Inc. v. Civil Aeronautics Board, 352 F.2d 735 (9th Cir. 1965) (holding the international waters between the islands of the State of Hawaii are a "place outside thereof" for purposes of 49 U.S.C. § 1301). In 1978, Congress confirmed that inter-island air transportation over the international waters between the islands of the State of Hawaii is operation in "interstate or overseas air transportation." *See* 49 U.S.C. § 1305(b)(2) (Supp. IV 1980), added by Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978). *See also* Stipulation of Facts in the Hawaii Tax Appeal Court ¶ 5 (J.A. 15-16), wherein Appellant and the Hawaii Director of Taxation have stipulated for purposes of this case that PSC tax assessments "are measured by the Taxpayer's (Appellant's) gross receipts from the carriage of persons by air between islands of the State of Hawaii over international waters."

the gross receipts derived from such activities. This plain meaning of the language of Subsection (a) was disregarded by the decision of the Hawaii Supreme Court.

The PSC tax does not escape prohibition under Subsection (b) of 49 U.S.C. § 1513 ("Subsection (b)"). Subsection (b) specifically defers to Subsection (a) by providing that:

> (b) [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a)* of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added).

The phrase "other than those enumerated in subsection (a) of this section" in Subsection (b) makes it as clear as words can that taxes prohibited by the language of Subsection (a) are not permitted by Subsection (b). The very presence of this phrase in Subsection (b) precludes the existence of the "seeming contradictions" between Subsection (a) and Subsection (b) on which the opinion of the Hawaii Supreme Court was based.[8]

[8] In addition, the Hawaii decision's conclusion that there are "seeming contradictions" between Subsections (a) and (b) and that 49 U.S.C. § 1513 prohibits only taxes on passengers and other users of airline services and not taxes on airlines flies in the face of an applicable rule of construction of federal statutes. In construing a federal statute, a court is obliged to give effect to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); United States v. Campos-Serrano, 404 U.S. 293, 301 n.14 (1971); United States v. Menasche, 348 U.S. 528, 538-39 (1955). The Hawaii decision's conclusion that there is a "seeming contradiction" between Subsections (a) and (b) wholly ignores the phrase in Subsection (b) providing that certain taxes "other than those enumerated in" Subsection (a) are permitted, which phrase precludes any claimed possible conflict between Subsections (a) and (b). Also, the Hawaii decision's conclusion that 49 U.S.C. § 1513 only prohibits taxes on passengers and other users of airline services but not taxes on airlines completely disregards the prohibition in Subsection (a) of taxes "on the sale of air transportation or on the gross receipts derived therefrom," both of which types of taxes are imposed on airlines, not on passengers or users. The Hawaii decision interprets 49 U.S.C. § 1513 as if these clauses were not in the statute. Giving effect to all the words of 49 U.S.C. § 1513 mandates a conclusion that such Section prohibits the PSC tax.

Subsection (b) confirms that as long as a tax is not "enumerated in" Subsection (a) it is permitted, and notes that many state revenue sources (property taxes, net income taxes, franchise taxes, and sales and use taxes on the sale of goods and services) are not affected by Subsection (a). In this latter respect, Subsection (b) records the careful counter-balancing of the federal interest in the development of an economically viable and safe national system of airport and airway development with the state authority and revenue concerns that is inherent in the statutory scheme. Accordingly, since the PSC tax is prohibited by Subsection (a), it is not permitted by Subsection (b).

Authorities relating to state taxes such as the PSC tax uniformly have followed the plain meaning of 49 U.S.C. § 1513 and held that taxes enumerated in Subsection (a) are prohibited without regard to the subordinate provisions of Subsection (b). In *State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1980), a transaction privilege tax of one percent (1%) of the gross proceeds of sale or gross income from the business of transporting persons by aircraft which by the terms of the statute was levied, among other things, "to reduce or eliminate the annual tax levy on property for state and county purposes" was voided under 49 U.S.C. § 1513 and the Supremacy Clause. The opinion in *Cochise Airways* rejected a contention that the subject tax was a sales tax "on the sale of goods or services" permitted by Subsection (b) because of the dominance of Subsection (a)'s prohibition, noting that any other construction would require a conclusion that 49 U.S.C. § 1513 was self-contradictory. 128 Ariz. at 437, 626 P.2d at 601. Similarly, in *Air Transport Association of America v. New York State Department of Taxation and Finance*, No. 43719 (N.Y. Sup. Ct., App. Div., 3d Dep't Jan. 20, 1983), set forth in Appendix B hereto, a state franchise tax of three-quarters of one percent (¾%) of gross earnings of corporations engaged in the conduct

of aviation was held void under Subsection (a), notwithstanding the fact that franchise taxes are among the types of taxes specifically listed in Subsection (b), on the basis that Subsection (a)'s prohibition controls over the subordinate provisions of Subsection (b). A similar result was reached in Ohio Attorney General's Opinion No. 73-117 (Nov. 20, 1973), set forth in Appendix C hereto, with respect to an Ohio airline excise tax of four percent (4%) of receipts derived from transportation of persons by air. These authorities confirm that the PSC tax is prohibited by Subsection (a).[9]

The PSC tax is clearly and unmistakably prohibited by the plain meaning of 49 U.S.C. § 1513. It is a tax under Subsection (a). Its measure, gross income from the airline business, as evidenced by the PSC tax law, the PSC tax return and the instructions thereto (J.A. 36-51), is gross receipts derived from the sale of air transportation or the carriage of persons traveling in air commerce. A tax so measured is prohibited whether levied or imposed directly or indirectly, and the PSC tax is

[9]Other decisions under 49 U.S.C. § 1513 confirm the counter balancing of federal and state interests and the continuation of certain state revenue sources inherent therein. For example, a 4% sales tax on the value of prepared meals purchased by two airlines from a catering firm was sustained in Air Jamaica, Ltd. v. Florida, 374 So.2d 575 (Fla. App. 1979). This tax was acceptable as a sales tax "on the sale of goods" that was not enumerated in and prohibited by Subsection (a). Also, in Airway Arms, Inc. v. Moon Area School District, _____ Pa. _____, 446 A.2d 234 (1982), *appeal dismissed*, No. 82-563, 51 U.S.L.W. 3507 (Jan. 10, 1983), taxes on fees and charges for vehicle parking in and about airports were sustained. Finally, in Island Aviation, Inc. v. Guam Airport Authority, Civil Case No. 81-00063 (Memorandum Order Oct. 4, 1982), service charges imposed by the Guam Airport Authority to cover costs of operations and maintenance of a sterile room holding service and a departure facility, to the extent reasonable for such purposes, were sustained by the District Court for the Territory of Guam under the second clause of Subsection (b). The second clause of Subsection (b) is not at issue in this case, only the first clause of Subsection (b) and its unmistakable deference to Subsection (a).

imposed directly on such prohibited measure.[10] The PSC tax is also prohibited by Subsection (a) as a tax directly or indirectly on the carriage of persons traveling in air commerce and as a tax directly or indirectly on the sale of air transportation. Since the PSC tax is enumerated in and prohibited by Subsection (a), it is not and cannot be permitted by Subsection (b). As noted by the United States of America, "the Hawaii Tax is a flagrant violation of federal law." Brief for the United States of America as Amicus Curiae (filed before the noting of probable jurisdiction herein), at 1-2.

The PSC tax does what Congress has specifically and unambiguously prohibited in 49 U.S.C. § 1513—that is, it imposes a tax on gross receipts derived from the carriage of persons traveling in air commerce or the sale of air transportation. Under the Supremacy Clause, clear and unambiguous commands of Congress invalidate contrary state legislation. This Court so held in a recent tax case which was presented in a setting markedly similar to the instant case, *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 146 (1979). In that case, this Court held that a federal statute and the Supremacy Clause invalidated a state tax. The federal statute therein prohibited state taxes on the generation or transmission of electricity which discriminated against out-of-state producers, sellers or consumers, directly or indirectly. The subject tax which was invalidated applied at a 2% rate to energy generated for interstate and intrastate consumption, but effectively credited intrastate producers or sellers so as to result in no extra state tax burden to

[10] The PSC tax is not a property tax by its terms and is not a property tax under applicable authorities. *See* Opening Brief of Taxpayer-Appellant Hawaiian Airlines, Inc. in the Hawaii Supreme Court 20-24, 26-30, Rec. 202-206, 208-218.

Also, a recent Hawaii Supreme Court decision held that travel agents' commissions retained by the agents on ticket sales are an includible part of an airline's "taxable gross income" subject to the PSC tax. In re tax Appeal of Aloha Airlines, Inc., 56 Haw. 526, 547 P.2d 586 (1976).

them. 441 U.S. at 149-50. This Court held that the tax was prohibited by the language of the federal statute, notwithstanding a New Mexico Supreme Court decision that the statute was not applicable to the tax and a State of New Mexico argument that the federal statute should be applied to the entire tax structure of the State and not just to the subject tax statute. 441 U.S. at 149; *Arizona Public Service Co. v. O'Chesky*, 91 N.M. 484, 576 P.2d 291 (1978). This Court rejected the latter argument as it was contrary to the language of the subject federal statute. 441 U.S. at 150. As was the case in *Arizona Public Service Co. v. Snead*, this case must be decided on the basis of the language of the federal statute (49 U.S.C. § 1513). *See also First Agricultural National Bank v. Tax Commission*, 392 U.S. 339, 343-44 (1968); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

The Hawaii Supreme Court has ignored the plain meaning of the language of 49 U.S.C. § 1513, and rendered the prohibition in Subsection (a) meaningless, except for head and other taxes on passengers. In substance, based on a manifestly erroneous premise of "seeming contradictions," the Hawaii decision is nothing more than a disagreement with the wisdom and reasonableness of Congress expressed in 49 U.S.C. § 1513. This is not an appropriate area of inquiry for a state court. The language of 49 U.S.C. § 1513 which prohibits the PSC tax must be given effect.

2. THE LEGISLATIVE HISTORY OF 49 U.S.C. § 1513 CONFIRMS THAT SUCH SECTION WAS INTENDED TO PROHIBIT TAXES SUCH AS THE PSC TAX.

Although resort to legislative history is unnecessary in the instant case because of the plain and unambiguous meaning of

the language of 49 U.S.C. § 1513,[11] the legislative history of 49 U.S.C. § 1513 provides illumnating confirmation that Congress intended on enactment thereof to prohibit taxes on gross receipts such as the PSC tax. This legislative history directly contradicts the determination by the Hawaii Supreme Court that Congress intended to limit the prohibition of 49 U.S.C. § 1513 to taxes on passengers and other users of the aviation system. J.S. App. A-22—A-24.[12]

The legislative history of 49 U.S.C. § 1513 commenced in 1970 with the creation of a national airport and airway development fund and the adoption of a federal air transportation tax "upon the amount paid for taxable transportation . . . of any

[11] Because the language of 49 U.S.C. § 1513 is clear and unambiguous in its prohibition of taxes such as the PSC tax, both judicial application of rules of construction and resort to legislative history to resolve uncertainties or ambiguities that do not exist are unwarranted. Howe v. Smith, 452 U.S. 473, 483 (1981); Tennessee Valley Authority v. Hill, 437 U.S. 153, 184n.29 (1978); Kuehner v. Irving Trust Co., 299 U.S. 445, 449 (1937); Fairport, Painesville, & E. R.R. v. Meredith, 292 U.S. 589, 594 (1934); Wilbur v. United States, ex rel. Vindicator Consolidated Gold Mining Co., 284 U.S. 231, 237 (1931).

[12] In determining that the PSC tax on airline passenger revenue was not invalidated by 49 U.S.C. § 1513 and the Supremacy Clause, the Hawaii decision employed what may be characterized as an "implicit preemption" analysis rather than an "express preemption" analysis. *See* Fidelity Federal Savings and Loan Association v. de la Cuesta, 102 S. Ct. 3014, 3022 (1982); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 391 (1978). The "implicit preemption analysis" employed in the Hawaii decision would be appropriate in cases where the issue is whether Congress has implicitly prohibited state regulation by enactment of federal regulations concerning the same subject matter. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (question whether Federal regulations regarding grain warehouses invalidated state regulations regarding grain warehouses); Hines v. Davidowitz, 312 U.S. 52 (1941) (question whether Federal Alien Registration Act invalidated state statute requiring alien registration). The instant case, however, involves an express prohibition of state law, not a possible implicit prohibition. 49 U.S.C. § 1513 commences with an express prohibition, *i.e.*, "No State . . . shall." In such a case, the "implicit preemption analysis" set forth in *Rice* and *Hines* and employed in the Hawaii decision simply does not apply. Rather, the only question at issue is whether the state statute falls within the express federal preemption. *See* Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979); First Agricultural National Bank v. Tax Commission, 392 U.S. 339 (1968).

person" as one of three sources of revenue designed to provide "commercial aviation's share of the cost of the federal activities." *See Massachusetts v. United States*, 435 U.S. 444, 451 (1978); 26 U.S.C. §§ 4261, 4262 (a portion of the Airport and Airway Revenue Act of 1970).[13] This federal air transportation tax was measured by a percentage of all domestic passenger fares, *i.e.*, an airline's gross receipts. 26 U.S.C. § 4261(a).

The first draft of what was to become 49 U.S.C. § 1513, H.R. 2337, was introduced on January 26, 1971,[14] as a bill "to prohibit State taxation of the carriage of persons in air transportation." It provided a prohibition of taxes on airlines, as follows:

> Sec. 1112. No State . . . shall levy or collect a tax, fee or other charge, directly or indirectly, on the carriage of persons in air transportation . . . .

The second draft, in two identical bills, H.R. 14847 and H.R. 14991, was introduced on May 9 and 16, 1972. In relevant part, it was the same as the first draft except for the addition of the language italicized below:

> Sec. *1113*. No State . . . shall levy or collect a tax, fee or other charge, directly or indirectly, on *persons traveling in air transportation or* the carriage of persons in air transportation . . .

What was in effect the third draft of the bill, S. 3755, introduced on June 27, 1972, added several additional prohibitions, all italicized below:

> Sec. 1113. No State . . . shall levy or collect a tax, fee, *head charge* or other charge, directly or indirectly, on

[13] To be precise, the legislation increased an existing tax upon taxable transportation of persons and imposed a similar tax on the transportation of property.

[14] This first draft was also subsequently introduced in the Senate on May 16, 1972 as S. 3611.

> persons traveling in air transportation or the carriage of persons in air transportation, *or on the gross receipts derived therefrom, provided, however, that nothing herein shall prohibit a State . . . from the levy or collection of taxes other than those enumerated above, including property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services (other than on the sale of interstate air transportation or any portion thereof)* . . . .

First and most significantly, the third draft added as a specific additional category of prohibited taxes, taxes "on the gross receipts derived" from persons traveling in air transportation or from the carriage of persons in air transportation. This language was added after Whitney Gillilland, Vice Chairman of the Civil Aeronautics Board, called to the attention of House and Senate Subcommittees in testimony an Ohio tax on the "gross receipts of airline business done in Ohio."[15] The Ohio tax was labeled a privilege tax much as the PSC tax is labeled a means of taxing personal property, but the language in Subsection (a) barring gross receipts taxes was included specifically to prohibit taxes like the Ohio tax and the PSC tax based on gross receipts. Second, head charges were added to the ever-expanding enumeration of prohibited taxes. This was in response to this Court's approval on constitutional grounds of head taxes in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 720 (1972). Finally, the third draft introduced the provision that certain taxes "other than those

[15] *See Air Passenger Fees–State and Local Charges: Hearings on H.R. 2337 etc. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. 52-59 (1972) (testimony of Hon. Whitney Gillilland, Vice Chairman, Civil Aeronautics Board); *Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S. 3611 etc. Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 137 (1972) (testimony of Hon. Whitney Gillilland, Vice Chairman, Civil Aeronautics Board).

enumerated above, including property taxes . . .," etc., were not prohibited. The initial location of this provision is significant because the prohibition, the permission and the exception to the permission deferring to the prohibition (*i.e.*, "other than those enumerated above") were all part of a single statutory sentence. This is a clear indication of the subordination of the permission to the prohibition. The third draft was "favorably reported with one substantive and numerous technical drafting amendments" by the Senate Committee on Commerce on June 28, 1972.[16] The substantive change related to airport development grants and has no relevance herein. The "technical and drafting changes" relating to 49 U.S.C. § 1513 included division of the single paragraph provision into two paragraphs [Subsection (a) and Subsection (b)] and adopting the language that is now 49 U.S.C. § 1513.

There were no further changes in the language of the statute, although 49 U.S.C. § 1513 was not enacted until one year later, in June 1973. On October 5, 1972, a Conference Report stated that the Senate version of the bill (the third draft) was acceptable to the House.[17] The Senate and the House both passed the bill as reported by the Conference Committee, but it was pocket-vetoed by President Nixon on October 27, 1972, at the end of the 92d Congress.[18]

[16]This third draft is significant since the applicable Committee Report stated that subsequent changes in 49 U.S.C. § 1513 were "of a technical or drafting nature and do not reflect substantive changes in the bill." S. REP. NO. 92-1005, 92d Cong.,2d Sess. 7 (1972).

[17]H.R. REP. NO. 92-1543, 92d Cong., 2d Sess. 4-5 (1972).

[18]The pocket veto was of the entire bill for reasons unrelated to the state tax prohibition provision with which we are concerned.

On the reconvening of the 93d Congress in January 1973, several bills were reintroduced which copied one or another of the 1972 drafts of the bill.[19]

The Senate, as noted in a February 1, 1973 report of the Senate's Commerce Committee, adopted again as S.38 the language of the statute pertinent to this appeal that the Conference Committee had agreed on in 1972.[20]

The House Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce held hearings in March 1973 on the airport development program. Once again, the Ohio tax on gross receipts of airlines was brought to Congress' attention. Theodore Koetz, Deputy Tax Commissioner of Ohio, testified in an attempt to avoid federal statutory prohibition of the Ohio 4% gross receipt tax on airlines.[21] Congress, however, refused to act on Mr. Koetz's recommendations and enacted the bill without substantial changes.[22] In the course of these hearings, Hawaii was also mentioned as a state which may impose a gross receipts tax on

[19] *See* H.R. 627, 93d Cong., 1st Sess. (introduced Jan. 3, 1973); H.R. 1784, 93d Cong., 1st Sess. (introduced Jan. 11, 1973); H.R. 2695, 93d Cong., 1st Sess. (introduced Jan. 23, 1973); S. 38, 93d Cong., 1st Sess. (introduced Feb. 6, 1973); H.R. 4082, 93d Cong., 1st Sess. (introduced Feb. 7, 1973); H.R. 4214, 93d Cong., 1st Sess. (introduced Feb. 8, 1973); H.R. 4182, 93d Cong., 1st Sess. (introduced Feb. 8, 1973); H.R. 4213, 93d Cong., 1st Sess. (introduced Feb. 8, 1973).

[20] *See* S. REP. NO. 93-12, 93d Cong., 1st Sess. 6, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 1434, 1436-37.

[21] *See Airport Development Acceleration Act of 1973: Hearings on H.R. 4082 etc. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 246-253 (1973) (testimony of Theodore Koetz, Deputy Tax Commissioner, State of Ohio).

[22] *See* H.R. REP. NO. 93-157, 93d Cong., 1st Sess. 2-3 (1973) indicating that the only relevant amendment to the bill related to the extension from July 1, 1973, to December 31, 1973, of the period of time within which certain taxes were exempt from the provisions of Subsection (a). The Conference Report followed this amendment. *See* H.R. REP. NO. 93-225, 93d Cong., 1st Sess. 5-6 (1973).

airline ticket sales.[23] The history of 49 U.S.C. § 1513, then, shows Congressional intent to prohibit broad categories of taxes, to prohibit taxes in addition to head taxes and to prohibit taxes imposed on airlines such as the PSC tax.

Another statement in the legislative history confirms that the broad prohibition of Subsection (a) was intentional. As noted by the Vice Chairman of the Civil Aeronautics Board in hearings in 1972:

> The devisers of taxes are pretty ingenious. I think we would find all sorts of taxes of this sort applied in different ways and with different measures, all over the country if something isn't done, and this would create an enormous burden on the movement of traffic and this is the thing that needs to be addressed.[24]

Other legislative history is also significant. Because of the then recent *Evansville* decision, considerable discussion in the legislative history centers on passenger head taxes. Such legislative history, however, fails to evidence any intent to confine the prohibitory terms of 49 U.S.C. § 1513 just to passenger head taxes. *See State v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (Ariz. App. 1980). Rather, it is clear that passenger head taxes were merely added to an already expan-

[23]The reference in the hearings to Hawaii was inaccurate to the extent that it described the 4% tax on gross receipts from airline ticket sales as legislation being considered rather than, as was then the case, a tax which had been in effect in its then existing form for nearly 10 years. The report characterizes the Hawaii tax (which is, or is equivalent to, the PSC tax herein) as a "head tax" and confirms Congressional intent to prohibit taxes such as the PSC tax. *See Airport Development Acceleration Act of 1973: Hearings on H.R. 4082 etc. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 260 (1973) (statement of John A. Nammack, Executive Vice President, National Association of State Aviation Officials).

[24]*Air Passenger Fees–State and Local Charges: Hearings On H.R. 2337 etc. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. 55 (1972) (testimony of Hon. Whitney Gillilland, Vice Chairman, Civil Aeronautics Board).

sive list of prohibited taxes, fees and other charges in response to the *Evansville* decision. The intention was to *broaden* the prohibition of 49 U.S.C. § 1513, not to narrow it. To accomplish its goal of prohibiting all state and local taxation of the carriage of passengers traveling in air commerce, Congress was aware that broad statutory language was necessary. Accordingly, broad statutory language was used in 49 U.S.C. § 1513(a) and, until the Hawaii Supreme Court's decision, such language had been given its full force and effect.[25]

Even in its discussion of passenger head taxes, the legislative history reflects Congress' awareness that, economically, it makes no difference whether a tax is imposed on the passenger or on the airline. As stated in the report of the Senate Commerce Committee:

> Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel.
>
> If the passenger must pay a local head tax, it adds directly to the cost of his trip. And if head taxes are absorbed by the carriers . . . it still will lead to increased air travel costs. If the air carriers had to absorb $1 for every air passenger carried last year, that would amount to $170 million. The airlines could not reasonably be expected to bear such a burden. In the end, a fare increase would have to be implemented. Thus, the air passenger loses either way on State and local head taxes . . . .[26]

By interpreting 49 U.S.C. § 1513 as prohibiting only taxes imposed directly on passengers or other users, the

[25] State v. Cochise Airlines, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1980); Air Transportation Association of America v. New York State Department of Taxation and Finance, No. 43719 (N.Y. Sup. Ct., App. Div. 3d Dep't Jan. 20, 1983); Ohio Op. Att'y Gen. No. 73-117 (Nov. 20, 1973).

[26] S. REP. NO. 93-12, 93d Cong., 1st Sess. 22 (1973), *reprinted in* [1973] U.S. CODE CONG. & ADMIN. NEWS 1434, 1451, 1455.

Hawaii Supreme Court disregarded key portions of applicable legislative history and Congressional intent to prohibit taxes on gross receipts such as the PSC tax. The Hawaii Supreme Court's construction of 49 U.S.C. § 1513 is not supported by its legislative history. Further, the Hawaii Supreme Court's conclusion that Congress intended to limit the prohibition in 49 U.S.C. § 1513 to taxes on passengers and users of the aviation system (J.S. A-21—A-24) is plainly erroneous.

Reversal of the Hawaii Supreme Court's decision is required to vindicate the substance of Congress' command in 49 U.S.C. § 1513(a) in accordance with its plain language and legislative history.

3. THE HAWAII DECISION SUBVERTS A FEDERAL STATUTORY SCHEME OF TAXATION AND SUPPORT TO AIRPORT AND AIRWAY DEVELOPMENT WITH IMMEDIATE NATIONWIDE IMPLICATIONS.

49 U.S.C. § 1513 was enacted as a part of a uniform national system of taxation and support for airport and airway development and safety in the Airport Development Acceleration Act of 1973. Prior legislation had established a funding base for such development and imposed an 8% tax on the price of domestic air passenger tickets. *State v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (Ariz. App. 1980). 49 U.S.C. § 1513's prohibition of state taxation was intended in part to protect revenues subject to this federal tax and to establish nationwide tax uniformity:

> In accepting a greater Federal role and responsibility in airport development the Committee has also acted to prohibit local taxation on passengers or on the carriage of passengers. We believe such taxation to be inimical to the

development of a *national system funded in large part by uniform federal taxes* . . . .

Nonetheless, the Committee views S. 38 as an aviation development package—the components of which cannot be separated . . . If local taxes on passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a federal airport development program . . . .

Therefore, by prohibiting state taxation on passengers or on air transportation, the Committee has accepted greater responsibility for U.S. assistance, believing that the two actions must be viewed together and that neither should stand alone without the other. S. REP. NO. 93-12, 93d Cong., 1st Sess. 26, *reprinted in* [1973] U.S. CODE CONG & AD. NEWS 1434, 1455 (emphasis added).

The Airport Development Acceleration Act of 1973 which included 49 U.S.C. § 1513 reflected a delicate balancing of federal and state interests. A federal interest in the development of an economically viable and safe national system of air transportation and the need for funding thereof were weighed in light of obvious state revenue interests.[27] Careful regard for these state revenue interests is reflected in Subsection (b)'s specification of state revenue sources not affected by the federal taxing prohibition. This regard is also reflected in the fact that taxes prohibited by Subsection (a) were limited to taxes, such as the PSC tax, which could adversely affect the ability of the previously adopted federal taxes to provide adequate revenue for the support of the uniform national system of air transportation.

[27] *See* S. REP. NO. 93-12, 93d Cong., 1st Sess. 6-22 (1973), *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 1434, 1437-1451.

The uniform national system of taxation and support for airport and airway development established in the 1973 Act has been subverted by the Hawaii decision. If the Hawaii decision is not reversed, it will provide a path to be followed by other jurisdictions wishing to evade the prohibition contained in 49 U.S.C. § 1513. In this regard, 49 U.S.C. § 1513 has to date been held to preclude taxes substantively similar to the PSC tax in Ohio, Arizona and New York.[28] Two additional cases with similar issues are now pending in Alaska.[29] Further, the tax laws of several other states pose the potential of litigation based on the contrived analysis found in the Hawaii decision.[30] If the Hawaii decision is not invalidated, a specific concern of Congress will be realized:

> If more than 500 localities—or even a significant proportion of this number—were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce. The national system of air service upon which 180 million airline passengers depend annually would become a hodgepodge of Balkanized assessments and levies against non-resident travelers whose business or leisure takes them across State lines. The committee bill prohibits State and local taxation of air fares, but this Federal preemption is

[28] *See* authorities cited in note 25, *supra*.

[29] Wien Air Alaska v. State of Alaska, Department of Revenue, No. 3AN 81-8582 (Alaska Super. Ct., 3d Jud. Dist., filed Dec. 10, 1981) and Alaska Aeronautical Industries, Inc. v. State of Alaska, Department of Revenue, No. 3AN 81-4286 (Alaska Super. Ct., 3d Jud. Dist., filed June 22, 1981).

[30] *See* DEL. CODE ANN. tit. 30, §§ 2301(d), (e) (Supp. 1982); IND. CODE ANN. §§ 6-2.1-2-2, 6-2.1-2-5 (Burns 1978 & Supp. 1982); MD. (TAX & REV.) CODE ANN., art. 81, §§ 129-30 (1980 & Supp. 1982); OKLA. STAT. ANN. tit. 68 §§ 1354 (West 1981 Supp.); WASH REV. CODE §§ 82.16.010-82.16.020 (1981); W. VA. CODE § 11-12A-2 (1974 & Supp. 1982).

carefully balanced by substantial increases in trust fund assistance for airport development and modernization. 119 CONG. REC. 3350 (1973) (comments of Senator Pearson). Reversal of the Hawaii decision is required to preclude the subversion of the uniform national system of taxation and support for airport and airway development established by the 1973 Act.

4. THE 1982 AMENDMENT TO 49 U.S.C. § 1513 SUPPORTS THE CONCLUSION THAT TAXES SUCH AS THE PSC TAX ARE PROHIBITED BY 49 U.S.C. § 1513.

49 U.S.C. § 1513 was amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. No. 97-248, 96 Stat. 324) ("TEFRA"), effective September 3, 1982. Title V of TEFRA is designated as the Airport and Airway Improvement Act of 1982 (96 Stat. 671-702). The principal change to 49 U.S.C. § 1513 effected by TEFRA is the addition of a further prohibition by new Subsection (d) to such section. The language of Subsection (b) was altered in form to reflect the addition of new Subsection (d). The full text of 49 U.S.C. § 1513, including the 1982 amendment, is reprinted in Appendix A to this brief.

The amendment of 49 U.S.C. § 1513 by TEFRA does not change the unmistakable prohibition of the PSC tax by Subsection (a) or the fact that Subsection (b) only permits taxes which are not prohibited by Subsection (a). Any assertion, such as that set forth in Appellee's Motion to Dismiss or Affirm in No. 82-586 in this Court at 10-11, that the amendment somehow permits the PSC tax for tax years not involved herein is manifestly wrong. As an initial matter, Subsection (a) is entirely unaffected by the amendment. The relevant language of Subsection (b) also is unaffected. The relationship between those

two provisions, therefore, and in particular the subordination of Subsection (b) to Subsection (a), remains unchanged. Nothing in the TEFRA amendment authorizes a state tax on gross receipts which hides behind a "property tax" label. Additionally, such amendment only applies to years subsequent to those involved in this appeal.[31]

[31]The relevant portion of 49 U.S.C. § 1513(d) states:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> . . . .
>
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

As observed in part by the dissenting opinion below (J.S. App. A-26), Hawaii does not have a personal property tax today, did not have one in 1962 when the Hawaii tax statute at issue here was enacted, and has not had one since 1947. (The Hawaii public service company tax at issue here is, by its own terms, "in lieu of the tax imposed by Chapter 237 but is not in lieu of any other tax." HAW. REV. STAT. § 239-6 (1976). Chapter 237 is a general excise tax, collected as a percentage of gross income. It is not a personal property tax. As noted, Hawaii has no personal property tax that the PSC tax could be "in lieu" of.) In comparison with "the tax rate applicable to commercial and industrial property in the same assessment jurisdiction," which rate is zero, any so-called "property" tax applied to the airlines is obviously larger, and therefore contrary to new Subsection (d) of 49 U.S.C. § 1513.

Further, any claim to the effect that the PSC tax is clearly non-discriminatory as a tax levied equally upon all Hawaii public service carriers must necessarily be based on an erroneous comparison. The TEFRA amendment to 49 U.S.C. § 1513 expressly says as much. A portion of 49 U.S.C. § 1513 (d)(2) states:

(2) In this subsection—

> . . . .
>
> (D) "commercial and industrial property" means property, *other than transportation property* and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy . . . (emphasis added).

The proper comparison is not with motor carriers subject to the PSC tax, as such a hypothetical argument would necessarily suggest, but rather with other commercial and industrial property. Since there is no personal property tax applicable to such other property, the application of any tax of this sort on an airline by the State of Hawaii would contravene the substance of the TEFRA amendment. It cannot be justified by it.

The amendment of 49 U.S.C. § 1513 by TEFRA buttresses the conclusion that such section prohibits the PSC tax. The amendment, in new Subsection (d) of 49 U.S.C. § 1513, adds additional classes of taxes prohibited by 49 U.S.C. § 1513, and otherwise does not alter the section.[32] Specifically, the amendment forbids assessments of state property taxes against airline transportation property at values proportionately closer to fair market value than assessment values for other commercial and industrial property are to fair market value of such other property and forbids higher ad valorem tax rates for airline property than rates for such other property. The amendment also permits taxation of transactions "in lieu" of ad valorem taxes only on

[32]The prohibition of additional categories of taxes is the only purpose of the amendment described in the legislative history thereof. The amendment's apparent origin was as a part of a bill to terminate the functions of the Civil Aeronautics Board. *See* H.R. 5103, § 205(b), 97 Cong., 1st Sess. (1981). The citations below are to pertinent explanations of that bill and TEFRA. *See Effects of Airline Deregulation; and Legislation to Advance the Date for Sunset of the Civil Aeronautics Board: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 216-17, 244-45 (1981) (Testimony of Paul R. Ignatius, President, Air Transport Association of America); *Tax Equity and Fiscal Responsibility Act of 1982*, Conference Report to Accompany H.R. 4961, H.R. CONF. REP. NO. 97-760, 97th Cong., 2d Sess. 722 (1982); 127 Cong. Rec. E5694 (1981).

condition that revenues therefrom are "wholly utilized for aeronautical purposes."[33]

This amendment by TEFRA and addition of new Subsection (d) of 49 U.S.C. § 1513 represents a reconsideration of the prohibitions already included in 49 U.S.C. § 1513 and a Congressional conclusion that such prohibitions should be continued *and expanded*. It further represents reaffirmation of the careful balancing between federal and state interests reflected in 49 U.S.C. § 1513, which balancing necessitates prohibition of taxes such as the PSC tax in the interest of development of an economically feasible and safe national air transportation system.

The issue in this case, however, is the prohibition of Subsection (a), not that of Subsection (d). Subsection (a) prohibits the PSC tax.

[33] Any claim that the PSC tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes" and therefore allowed by new 49 U.S.C. § 1513(d)(3) necessarily fails. As an initial matter, all revenues from the PSC tax go into the general fund of the State of Hawaii and the use of such revenues is not limited to airport and aeronautical purposes. HAW. REV. STAT. § 239-10 (1976). [In fact, it is possible that none of such funds are used for such purposes. Hawaii's airports are financed from airport use charges and other sources separate from the PSC tax. (J.A. at 21, 22.) Between 1973 and 1978, Appellant paid use charges totaling $2,010,475 to the State of Hawaii. (*Id.*)]

Additionally, new Subsection (d)(3) of 49 U.S.C. § 1513 does not amend, limit or otherwise modify Subsection (a). Rather, Subsection (d) only limits the taxes allowed by Subsection (b). Taxes allowed by Subsection (b) before TEFRA included only taxes not "enumerated in" Subsection (a). To be allowed by Subsection (b) after TEFRA , a tax must not be enumerated in either Subsection (a) or the new Subsection (d). This is clear from TEFRA's addition of the phrase "except as provided in Subsection (d)" at the beginning of Subsection (b). Therefore, while the meaning of the words "in lieu" in Subsection (d)(3) is far from clear, it is clear that the use of such words has no relevance herein. Subsection (d)(3) merely states that Subsection (d) does not prohibit certain "in lieu" taxes.

CONCLUSION

The Hawaii Supreme Court's opinion is contrary to the plain meaning and legislative history of 49 U.S.C. § 1513. It disrupts a carefully drawn federal program for support of a national system of air transportation. The judgment of the Hawaii Supreme Court should be reversed.

Respectfully submitted,

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HAWAIIAN AIRLINES, INC.

APPENDIX A

Applicable Statutes

1. Act of Congress: Federal Aviation Act of 1958

Section 1113, as enacted in Section 7(a) of the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88, 90, and codified at 49 U.S.C. § 1513, and as amended by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 701[1], which provides as follows:

Prohibition; exemption.

SECTION 1113(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subdivision until December 31, 1973.

Permissible State taxes and fees.

(b) *Except as provided in subsection (d) of this section,* nothing in this section shall prohibit a State (or political subdivi-

[1]The additions made by the 1982 amendatory Act are in italics.

sion thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Nonapplicability.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until December 31, 1973.

(d) (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assesed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection–

(A) "assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposed or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

2. Act of Legislature of the State of Hawaii: Public Service Company Tax Law (Chapter 239, Hawaii Revised Statutes), Section 239-6, which provides as follows:

§ 239-6 **Airlines, certain carriers.** *There shall be levied and assessed upon each airline a tax* of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, *the tax shall be three per cent of its gross income each year from the airline business*. There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [the Hawaii General Excise Tax] but is not in lieu of any other tax. [Emphasis added.]

APPENDIX B

STATE OF NEW YORK — SUPREME COURT
APPELLATE DIVISION — THIRD DEPARTMENT

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

—against—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE et al.,

Appellants.

Argued, December 14, 1982.

Before: HON. T. PAUL KANE,
Justice Presiding,

HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. LEONARD A. WEISS,
HON. HOWARD A. LEVINE,
Associate Justices.

APPEAL from a judgment of the Supreme Court at Special Term (DeForest C. Pitt, J.), entered June 22, 1982 in Albany County, which, *inter alia*, granted plaintiff's motion for reargument, and, upon reargument, declared section 184 (subd. 1) of the New York State Tax Law to be unconstitutional.

ROBERT ABRAMS, Attorney-General (Francis V. Dow of counsel), for appellants, The Capitol, Albany, New York 12224.

DEBEVOISE & PLIMPTON (Andrew C. Hartzell of counsel), for respondent, 299 Park Avenue, New York, New York 10171.

OPINION FOR AFFIRMANCE

#43719

KANE, J. P.

Plaintiff is an unincorporated trade and service association consisting of 31 air carriers, 21 of whom do business in New York State. In this declaratory judgment action, plaintiff contends that section 184 (subd. 1) of the New York State Tax Law imposes a tax that is prohibited by section 1113 of the Federal Aviation Act (U. S. Code, tit. 49, § 1513) and is, therefore, unconstitutional under the supremacy clause (art. VI, cl. 2) of the United States Constitution.

Section 1113 of the Federal Aviation Act provides, in pertinent part, that:

> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, *directly or indirectly*, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* . . . (emphasis added).
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . .

Section 184 (subd. 1) of the Tax Law provides, *inter alia*, that:

> Every corporation . . . formed for or principally engaged in the conduct of aviation . . . for the privilege of exercising its corporate franchise, or of doing business, or of employ-

ing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, *shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state* (emphasis added).

Special Term found that section 184 (subd. 1) of the Tax Law, while called an "additional franchise tax," was, *inter alia*, "in fact a tax upon the gross receipts from sale of air transport services" and that section 1113 of the Federal Aviation Act forbids such a tax. This being the case, Special Term declared section 184 (subd. 1) of the Tax Law unconstitutional. This appeal ensued.

Defendants' central argument is that the gross earnings of section 184 (subd. 1) are not entirely composed of gross receipts from the sale of air coverage, but have other components. As such, defendants assert that the franchise tax in question, which includes gross receipts in its measurement, is permissible and, therefore, not in conflict with section 1113 since subdivision (b) of that section explicitly permits the levy of franchise taxes.

This argument must be rejected. In our opinion, the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation. Moreover, legislative history, evidenced by the various forms of the bills and hearing testimony, supports our reading of section 1113 of the Federal Aviation Act. In particular, Congress refused to adopt a suggestion by the State of Ohio to add language to subdivision (b) of section 1113 which would have permitted State taxation of fairly apportioned air carrier gross receipts (see Hearings Before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Congress, First Session).

In November, 1973, the Ohio Attorney-General issued an opinion declaring the Ohio excise tax discussed above to be in conflict with section 1113, as that section "prohibits both direct and indirect state taxation of the sale of air transportation" (Ohio Attorney-General Opn. No. 73-117). We would also note that the Court of Appeals of Arizona has held that a transaction privilege levy imposed by Arizona on air carriage measured by gross receipts of sales was impermissible as it conflicted with, and was thus preempted by, section 1113 (*State ex. rel. Arizona Dept. of Revenue v. Cochise Airlines*, 626 P 2d 596 [Ariz.]).

Defendants argue that the New York franchise tax challenged herein is distinguishable from both the Ohio tax and Arizona tax. We, however, are unable to find any meaningful distinction. The language of section 184 (subd. 1) also refers to "privilege", and defendants' argument that the measurement of the challenged tax by gross earnings is distinguishable from a direct tax on gross receipts is without substance. In this regard, the fact that section 184 (subd. 1) of the Tax Law imposes a tax on other categories of income does not alter the fact that it imposes a tax upon the gross receipts derived from air carriage.* Finally, defendants' contention that to construe the Federal statute as prohibiting the use of gross receipts in determining franchise taxes would render meaningless the explicit provision in section 1113 (subd. [b]) permitting the levy of franchise taxes by States is specious, since the measurement for the franchise tax could be structured in a different way (but see *Matter of Aloha Airlines, Inc.*, 647 P 2d 263 [Hawaii], U.S. S. Ct. app. pending).

*Plaintiff does not challenge the tax on other categories of income.

We would, therefore, agree with Special Term that section 184 (subd. 1) of the Tax Law is preempted by the subject Federal statute insofar as gross earnings are measured by gross receipts from air carriage. Special Term's judgment must, therefore, be affirmed.

The judgment should be affirmed.

APPENDIX C

Ohio Attorney General's Opinion
Number 73-117 (November 20, 1973)

Honorable Robert G. Kosydar
Tax Commissioner of Ohio
Department of Taxation
68 East Cay Street
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads in part as follows:

> Do the provisions of Section 1113 of the Federal Aviation Act of 1958 apply after December 31, 1973 to prohibit the levy, collection, and enforcement of the Ohio Airlines Excise Tax?

Before reaching your substantive question, I consider it appropriate to note that questions of this type are within the province of this office's opinions. Former Attorney Generals have advised that certain statutes conflicted with federal enactments, and therefore were superseded to the extent they were inconsistent. See Opinion No. 2065, Opinions of the Attorney General for 1933; Opinion No. 818, Opinions of the Attorney General for 1937; Opinion No. 2891, Opinions of the Attorney General for 1962.

The rationale for these opinions can be summed up that the Attorney General is required by his oath of office to support and defend the Constitution of the United States of America. When and if there is a conflict between the state law and the federal law in areas where the federal law is applicable, the Supremacy Clause controls and the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See *Ex parte Young*, 209 U.S. 123, 150-169

(1908); *Delchamps, Inc. v. Alabama State Milk Control Board*, 324 F. Supp. 117, 118 (1971); *Whitehill v. Eklins*, 258 F. Supp. 589, 596 (1966) and cf. *Hansen v. Barlow*, 456 P.2d 177, 181 (1969).

On June 18, 1973, the President signed into law the "Airport Development Acceleration Act of 1973" (P.L. 93-44). Of particular importance is Section 7 (A) of this act which amends Title XI of the Federal Aviation Act of 1958 to read as follows:

[Text of 49 U.S.C. § 1513 omitted]

The problem posed by your question is to determine whether the language of Section 1113 of the Federal Aviation Act is inclusive of the Ohio Airlines Excise Tax. The authority for the establishment of the Ohio Airlines Excise Tax is provided by R.C. 5745.02 which states in part:

> [A]n excise tax is hereby imposed upon the privilege of engaging in the business of transporting persons or property by air within this state.
>
> The tax is as follows:
>
> (A) Four per cent of the receipts derived from transportation which begins and ends within this state;
>
> (B) Where the transportation does not begin and end within this state, four per cent of the receipts derived therefrom attributable to business carried on within this state based on the proportion of the mileage within the state to the entire mileage over which the persons or property are transported, into or out of the state.
>
> All moneys received in the state treasury from the tax levied in this section shall be deposited to the credit of the general revenue fund.

Upon examination of the language of Section 1113 of the Federal Aviation Act of 1958, it becomes readily apparent that it provides a broad and inclusive prohibition of certain taxes on air commerce levied by state governments. The provisions

reached much further than the prohibition of individual "head taxes." Rather, Section 1113 prohibits both direct and indirect state taxation of the sale of air transportation. Section 1113 clearly states that:

> No state . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage or persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* . . .

The language of this section is clearly inclusive of the Ohio Airlines Excise Tax (R.C. 5745.02) which by its terms falls within the category of a tax upon the gross receipts derived from the sale of air transportation.

The power to regulate air commerce is vested in the federal government by the commerce clause of the United States Constitution (Article I, Section 8, U.S. Constitution), and such regulatory power is expressed by the Federal Aviation Act of 1958. Upon examining the federal regulatory power, it is clear that any power which the states have exercised over interstate commerce by reason of congressional inaction ceases to exist the moment Congress asserts its authority over interstate commerce through the enactment of legislation that conflicts with or covers the same subject as a state statute.

In the case of *United Airlines v. Porterfield*, 28 Ohio St.2d 97 (1971), the Ohio Supreme Court held that the Ohio Airlines Excise Tax was not violative of the Ohio and United States Constitutions as an undue interference with interstate commerce. However, at the time that case was decided, Congress had taken no action on the question of state taxation of air commerce. Congress has since acted on the taxation problem with the enactment of Section 1113 of the Federal Aviation Act of 1958 which prohibits state taxation of the sale of air transportation. Section 1113 also provides that those taxes which

were in force prior to May 21, 1970 are exempted from the provisions of the section until December 31, 1973.

Because of the broad language of Section 1113 of the Federal Aviation Act of 1958, the Ohio Airlines Excise Tax (R.C. 5745.02) falls within the provisions of Section 1113 and must be discontinued as of December 31, 1973.

In specific answer to your request it is my opinion and you are so advised that:

1. The Attorney General may advise that a state statute is invalid insofar as it conflicts with a federal statute.

2. The provisions of Section 1113 of the Federal Aviation Act of 1958 apply after December 31, 1973, to prohibit the levy, collection, and enforcement of the Ohio Airlines Excise Tax, R.C. 5745.02.

Respectfully,

WILLIAM J. BROWN
Attorney General

Office-Supreme Court, U.S.
FILED
MAY 16 19[illegible]
ALEXANDER [illegible]

Nos. 82-585 & 82-586

In The

Supreme Court of the United States

October Term, 1982

ALOHA AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

HAWAIIAN AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF OF APPELLEE, DIRECTOR OF TAXATION, STATE OF HAWAII

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QUESTION PRESENTED

Is the Hawaii Public Service Company Tax imposed by Hawaii Rev. Stat. 239-6, which is reasonably characterized as a property tax, invalid under the supremacy clause to the extent it is measured in part by gross income received by air carriers from the intrastate transportation of persons because 49 U. S. C. 1513 prohibits any state from directly or indirectly imposing a tax on persons or on the carriage of persons in air commerce?

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STATEMENT OF THE CASE

This consolidated case arises out of the claims of Aloha Airlines, Inc., a Hawaiian corporation, and Hawaiian Airlines, Inc., a Hawaiian corporation (hereinafter referred to as the airlines). The airlines here argue that Hawaii Rev. Stat. 239-6 violates the federal constitution's supremacy clause because 49 U. S. C. 1513 proscribes the levy of *any* tax on airlines (including general business or property tax) to the extent the tax is measured by gross receipts that derive from air transportation of persons.

This consolidated case was submitted on Stipulations of Facts which, except for certain Exhibits, are set forth in the Joint Appendix (hereinafter cited as J.A.). The only facts in controversy that this Court must address are those "facts" to be gleaned from the legislative history relating to the purposes and policies behind the Congressional enactment of the two relevant federal laws. These two enactments, 49 U. S. C. 1513 as contained in the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88 *et seq.*, and the Airport and the Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236, are hereinafter referred to as ADAP — the federal Airport Development Aid Program.

A. Statement of Facts.

The pertinent facts are as follows:

(1) The airlines are domestic Hawaiian corporations with their principal places of business in Hawaii. All of their properties and employees are located in Hawaii except for those employees and properties associated with out-of-state ticket sales offices. (J.A. at 11, 12, 15, 30).

(2) The airlines are public service companies as defined in Hawaii Rev. Stat. 239-2. They are engaged in the

business of the transportation of persons and property by air between airports on various islands of the State of Hawaii (J.A. at 6, 15). Hawaiian Airlines, Inc. also provides technical services for charter and private aircraft in Hawaii (Hawaiian Record at 115 (k), Hawaiian Airlines Exhibit I, 1978 Annual Report, at 7).

(3) Hawaii Rev. Stat. 239-6 (hereinafter referred to as HRS 239-6 or the PSC Tax) is not measured by the airlines' gross income from transportation of passengers or freight between Hawaii and any other state or country, or between any two points outside the State of Hawaii. The measure of HRS 239-6 only includes gross income from inter-island transportation. (J.A. at 11, 28-9).

(4) Except for the PSC Tax, the airlines do not pay any tax to any state or foreign country upon their tangible and intangible personal property, including going concern values (J.A. at 12, 13, 32) or any tax measured by their gross income from inter-island air transportation of passengers or freight. (J.A. at 13, 32).

(5) Tickets to fly on the airlines' inter-island flights are sold in Hawaii by the airlines, and by other airlines and travel agents throughout the United States and foreign countries. (J.A. at 12, 28).

B. History of Proceedings.

Although Section 1513 was enacted as part of the Airport Development Acceleration Act of 1973, the airlines without question nevertheless voluntarily continued to pay the taxes prescribed by HRS 239-6 for several years after 1973. The airlines' current position, that HRS 239-6 is invalid as applied to the extent measured by gross receipts that derive from air transportation of persons, was first advanced in 1977 by Aloha Airlines and in 1978 by Hawaiian Airlines. The airlines do not con-

tend that any other gross income from their air transportation is deductible from the measure of HRS 239-6.

The Hawaii Supreme Court's opinion is reproduced in the Jurisdictional Statement submitted by Hawaiian Airlines (hereinafter referred to as H.A. Jur. Stmt.) at A-1 to A-27. After a brief statement of the facts and proceedings, the court analyzed the Hawaiian tax in question, noting that the tax is a direct descendant of the Public Utility Tax which was adopted in 1932 (*id.* at A-8 to A-9). The court explained:

> Our Territorial predecessors considered the nature of the levy in question early in the history of the Public Utility Tax; they concluded it "imposes a tax comparable to the *ad valorem* real and personal property taxes otherwise imposed" by the laws of the Territory of Hawaii. *Hawaii Consolidated Railway v. Borthwick,* 34 Haw. 269, 281 (1937), *aff'd* 105 F.2d 286 (1939).

The Hawaii Supreme Court then stated:

> Turning to the federal statutes, we initially note the Airport and Airway Development Act of 1970, 84 Stat. 219 (the Development Act) and the Airport and Airway Revenue Act of 1970, 84 Stat. 236 (the Revenue Act) were passed in tandem "to provide for the expansion and improvement of the Nation's airport and airway system." H. R. Rep. No. 91-601, 91st Cong., 2d Sess., 1, *reprinted in* [1970] U. S. CODE CONG. & AD. NEWS 3047, 3047. In short, the Development Act declared a congressional policy to increase federal expenditures for the foregoing purpose and the Revenue Act was designed to provide the means for implementation. "In substantial part, this purpose . . . [was] to be achieved through the imposition and application of airport and airway user charges." *Id.* Certain taxes already in existence were increased and other new aviation user taxes were imposed to finance the desired expansion and improvement of the system. *See* 26 U. S. C. Sections 4261 and 4271. The taxes imposed on the air transportation

> of persons and property were made payable in each case "by the person making the payment subject to the tax." 26 U. S. C. Sections 4261 (d) and 4271 (b) (1). And an Airport and Airway Trust Fund was established to serve as the repository of the taxes collected and the moneys appropriated for the program.

(H. A. Jur. Stmt. at A-9, A-10 to A-11) (brackets in original; footnotes omitted).

In support of its statement, the Hawaii Supreme Court explained at note seven of its opinion:

> The legislative rationale for imposing the taxes on the ultimate users of air transportation was stated as follows:
>
> > The Ways and Means Committee's action, insofar as commercial carriers are concerned, obtains most of the additional tax revenue from passenger and freight ticket taxes by increasing the present 5-percent passenger ticket tax to 8 percent and by imposing a new $3 "head" tax on passenger tickets for international flights and a new 5-percent "waybill" tax on air freight.
> >
> > The decision to derive the bulk of additional commercial aviation revenue from the passenger and freight ticket taxes was based upon three primary factors. First, extensive administrative experience is available from the present collection of the 5-percent passenger tax .... Second, a tax upon the value of a ticket or waybill will grow not only as air traffic increases in volume but also as prices rise. Third, a ticket tax is geared to charge an equitable tax related to the distance traveled and the cost per mile of air operation.... Ticket taxes on passengers and shippers are therefore an efficient and equitable user charge imposed directly on the ultimate passenger and freight users of the commercial sector of the aviation system.

H. R. Rep. No. 91-601, *supra* at 38-39, [1970] U. S. CODE CONG. & AD. NEWS, at 3084.

(H. A. Jur. Stmt. at A-11).

The Hawaii Supreme Court then noted:

> Two years later Congress' attention was redirected to the program by a perceived need for even greater federal funding of the costs of airport development. But in the meanwhile the Supreme Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U. S. 707 (1972), had been issued. . . . Fearing a proliferation of similar charges at airports throughout the country, Congress included the provisions presently codified as 49 U. S. C. Section 1513 in the Airport Development Acceleration Act of 1973, 87 Stat. 88-90 (1973). That the proscriptions embodied therein were in response to the judicial approval of the new head taxes adopted by state and local governments subsequent to the passage of the Airport and Airway Development and Revenue Acts of 1970 is expressly confirmed by a pertinent legislative document. *See* S. Rep. No. 93-12, 93d Cong., 1st Sess. 1, *reprinted in* [1973] U. S. CODE CONG. & AD. NEWS 1434.[9]

(H. A. Jur. Stmt. at A-12).[1]

The Hawaii Supreme Court then examined the language of Section 1513. In Part IV. of its Opinion (*id.* at A-17 to A-25), the court sought to "harmonize the seeming contradictions" (*id.* at A-14) between subsection (a) and subsection (b). The Hawaii court reviewed the

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[1]Note nine of the Hawaii Supreme Court's decision continued as follows:

The report states in relevant part that:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in

(Continued on next page)

preemption decisions of this Court and concluded that only taxes imposed directly or indirectly on persons using air transportation services were preempted by the provisions of Section 1513(a). More particularly, the court's reasoning was that the Hawaii tax was a tax in the nature of a property tax specifically excepted from subsection (a) by subsection (b). (H. A. Jur. Stmt. at A-22). In this consolidated appeal, the airlines, supported by the Air Transport Association of America (hereinafter referred

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(Continued from previous page)

response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc., et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

S. Rep. No. 93-12, *supra*, at 17, [1973] U. S. CODE CONG. & AD. NEWS, at 1446.

This intent to preempt the levy of head or other user taxes is also stated in several other places in the report, to wit:

The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

S. Rep. No. 93-12, *supra*, at 4, [1973] U. S. CODE CONG. & AD. NEWS, at 1435 and

S. 38 contains a prohibition on State taxation of passengers or on the carriage of passengers in air transportation. This prohibtion will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax.

S. Rep. No. 93-12, *supra*, at 11-12, [1973] U. S. CODE CONG. & AD. NEWS, at 1441.

(H.A. Jur. Stmt. at A-12, A-13).

to as ATA) and the Solicitor General as *amici*, contend that even though the PSC Tax as applied to airlines is not a *tax* prohibited by Section 1513(a), and even though the PSC Tax is a *tax* expressly permitted by Section 1513 (b), it nevertheless cannot be measured by gross receipts or gross income[2] from the transportation of persons.

SUMMARY OF ARGUMENT

The issue here is what tax restrictions Congress intended to impose on the states and their political subdivisions (hereinafter referred to as the states) by enactment of Section 1513. Legislative history reveals Congressional intent only to prevent the states from: (1) directly or indirectly imposing taxes similar to the federal taxes already imposed by Congress on users of air transportation (I. R. C. Sections 4261 and 4271); and (2) imposing discriminatory taxes on airlines that, in effect, would impose the forbidden federal user taxes by an indirect means. More specifically, Congress feared the proliferation of head taxes or charges, which the states were increasingly utilizing both to obtain revenue to fund airport development and safety, and to raise funds for general revenue purposes. To prevent the proliferation of local taxes, Congress enacted Section 1513 (a). As a *quid pro quo*, Congress also increased federal user taxes and federal funding for airport development and safety.

That Congress decided to prohibit the states from directly or indirectly imposing taxes on users of air transportation or from imposing discriminatory taxes on airlines does not support the conclusion that Congress intended to exempt the airlines from any general business

[2]This brief uses the terms "gross receipts" and gross income as synonyms.

or property taxes that are imposed to support general government expenditures. There is therefore no reason to conclude that the PSC Tax has been invalidated by Section 1513 to the extent that it is measured by gross income from air transportation of persons. If Congress intended to grant a general business tax or property tax immunity to airlines it could have done so—but it did not. Subsection (b) does exactly the opposite: it expressly excepts these taxes from preemption.

Nothing in the legislative history supports the position advocated by the airlines, the Solicitor General, and the ATA (hereinafter sometimes referred to as the airlines and their *amici*) in these causes. Except for brief references to the specific discriminatory tax imposed by Ohio on the transportation of persons by air, the legislative history (including all witnesses testifying in hearings held by both houses of Congress) is devoted entirely to the subject matter of state user taxes, especially "head taxes." These taxes are similar to the federal user taxes (I. R. C. Sections 4261 and 4271) enacted by Congress to finance airport development and safety. The ATA generally represented the nation's scheduled airlines in the Congressional hearings. While objecting to Ohio's discriminatory tax, an ATA spokesman specifically stated that the airlines were not seeking any Congressional immunity or exemption from general business or property taxes.[3]

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[3] "The airlines pay all the taxes that other business enterprises pay in the State of Ohio . . . but we do not want to be singled out as one industry in that State to provide for this particular State's obligations." Bills to amend the Airport and Airway Development Act of 1970: Hearings on H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. 98-99 (Mar. 14, 15, 20, 22, & 27, 1973) (Leg. Hist. App. at 136-37).

Consistent with this intent and history, Congress enacted Section 1513. Subsection (a) expressly prohibits the states from imposing any *taxes* directly or indirectly *on* persons or *on* the carriage of persons in air commerce or *on* the sale of air transportation or *on* the gross receipts derived therefrom. Subsection (b) expressly limits subsection (a) to these specific *taxes*. It expressly permits the states to impose general business and property taxes on airlines, such as property taxes, franchise taxes, net income taxes, and gross receipts taxes.

Admittedly, the PSC Tax is a tax expressly included within subsection (b) because it is reasonably characterized as a property tax. Otherwise, the airlines would not continue to pay this tax less the deductions they claim here. After voluntarily paying the PSC Tax for a number of years after the effective date of Section 1513, the airlines are now belatedly contending that subsection (a) is not limited to the proscription of certain taxes. They argue that subsection (a) precludes the imposition of *any tax* on airlines, including those expressly permitted by subsection (b), to the extent the tax is *measured by gross receipts* from air transportation of persons. In substance, they would rewrite subsection (a) to read in part as follows:

> **The States are prohibited from imposing any nondiscriminatory general business or property taxes on airlines to the extent measured by gross income from the transportation of persons by air, but the States are not prohibited from imposing any general business or property taxes that are measured by any other method.**

This argument assumes that requiring airlines to pay their fair share of state general taxes (which happen to be measured by gross receipts), conflicts with Congressional policy to preempt state taxes paid by users of air tran-

sportation. The principal argument advanced by the Solicitor General would expand this totally illogical and unsupportable basic assumption. (Br. for the United States at 6-12). This assumption is neither supported by any language of Section 1513 nor by any legislative history of ADAP, including Section 1513. It conflicts with Congressional intent to balance carefully the taxes preempted by Section 1513 (a) with increased federal expenditures to the states for airport development and safety. The general business and property taxes on airlines that are admittedly permitted by subsection (b), if measured by methods other than gross receipts, may be equally or even more burdensome on airlines than if measured by gross receipts.

In addition, the airlines' argument is not supported by Congressional concern with: (1) state duplication of federal user taxes; (2) discriminatory taxes imposed on airlines; or (3) any federal involvement in airport development or safety. This argument is nothing more than a belated effort by the airlines and their *amici* to mechanically construe the language of subsection (a) to preferentially grant airlines a deduction in computing the PSC Tax. This deduction is expressly denied by subsection (b) and is totally unrelated to ADAP purposes or policies. This argument of the airlines derives from an unsupported expansion of the phrase "or on the gross receipts derived therefrom" contained in Section 1513 (a).

ARGUMENT

I. Introductory Considerations.

The basic issue in this case is whether Congressional enactment of ADAP (including Section 1513) evidences

intent to exempt the airlines from the PSC Tax to the extent measured by gross receipts from air transportation. In spite of the specific language of subsection (b) that permits the imposition of the PSC Tax, the airlines and their *amici* contend that Congress unambiguously intended to do so.[4] They contend that even though the PSC Tax is a property tax, or other tax expressly permitted by Section 1513 (b), it still cannot be measured by gross income from air transportation. They base their argument on the unsupportable conclusion that Section 1513 (a) "will be rendered ineffective" (Br. for the United States at 2) unless their interpretation of Section 1513 (a) is adopted by this Court.

In contrast, Hawaii contends that absolutely nothing in the legislative history of ADAP supports a Congressional intent to specifically exempt airlines from the PSC Tax because it is measured by gross income (rather than by any other measure, such as *ad valorem* value of the airline's tangible and intangible properties), which could produce an equivalent or greater tax burden on the airlines.

II. The Legislative History Of Section 1513 And ADAP Reveals That Congress Did Not Intend To Exempt The Airlines From The PSC Tax To The Extent Measured By Gross Receipts From Air Transportation Of Persons On Inter-Island Flights.

A. Introductory Considerations.

The controlling question in interpreting any statute is to determine legislative intent. This in turn requires the application of proper rules of statutory construction

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[4]This argument conflicts with the airlines' appeal only from that portion of the PSC Tax measured by gross income from air transportation *of persons*. The airlines' appeal was apparently based on the reasoning that the inclusion of receipts from the transportation of persons in the measure of the PSC Tax was equivalent to a "head tax or charge" on the carriage of persons in air transportation.

and requires an examination of the statutory language in reference to the legislative history and basic policies and goals sought to be achieved by the legislation. Before engaging in a detailed examination of the Congressional history of Section 1513 and ADAP, it is important to consider the policies and goals that Congress intended to implement. In enacting ADAP, Congress intended to improve aviation by improving airport facilities. As a matter of policy, Congress also intended to finance ADAP by levying taxes upon users of air transportation. The controversy in this case derives from differing views of the nature and extent of the restrictions that Congress imposed on the taxing powers of the states to implement these policies.

An examination of the legislative history demonstrates that Congress intended only to prohibit the states from directly or indirectly duplicating the federal taxes required to be paid by the users of air transportation. The legislative history also reveals that the only justification for the restrictions on state and local imposition of even these taxes was to eliminate: (1) the need for local user taxes (such as head taxes) by increasing the federal user taxes earmarked for expenditure toward airport development and safety; and (2) the impediment to air transportation caused by local user taxes, irrespective of whether the airlines or the users were required to pay the taxes. Congress was also concerned that: (1) some local jurisdictions were implementing user taxes to fund general revenue expenditures; and (2) local user taxes imposed discriminatory burdens on air travelers. Although not addressed in the legislative history in any significant manner, Congress was also concerned with *discriminatory taxes* on the airlines, such as the specific tax imposed on

airlines by Ohio. Contrary to the position of the airlines and their *amici,* nothing in the Conference Reports, the Bill Reports, the Congressional Record, or the Hearings remotely suggests that Congress intended to exempt airlines from general nondiscriminatory business or property taxes, such as the PSC Tax, to the extent these taxes were measured by gross receipts from air transportation.

B. An Examination Of The Legislative History Of 49 U. S. C. Section 1513 Demonstrates That Congress Intended To Preempt Specific User Taxes That It Had Previously Imposed To Fund Airport Development And Safety: This Type Of Tax May Generally Be Characterized As A "Head Tax."[5]

The 1973 Senate Bill Report characterizes S. 38 as having two purposes: "to increase Federal financial assistance for airport development throughout the United States" and to prohibit "the levying, by State and local governments, of passenger 'head' taxes or user taxes on the carriage of persons in air transportation."[6] The Congressional history of S. 38 and its predecessor bills also establishes that Congress was concerned with any state tax that singled out either air transportation users or the airlines for discriminatory treatment by imposing a specific tax on the gross receipts of air transportation (as contrasted with a property tax or a general business tax measured by gross receipts) which in actual economic substance would constitute an indirect head tax. This is illustrated by Ohio's tax imposed on air transportation. See *United*

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[5]This brief uses the phrase "head tax" to mean a tax on each person that is a member of a designated class or group. In this case, it represents a tax levied on air passengers and may be either a flat rate tax or a percentage of fare tax. The tax may be either a direct tax collected from each passenger (as an enplaning or deplaning fee) or an indirect tax imposed upon the airline but ultimately paid by the passenger.

[6]S. Rep No. 93-12, 93rd Cong., 1st Sess. 4 (Feb. 1, 1973) (Leg. Hist. App. at 110).

Airlines, Inc. v. Porterfield, 28 Ohio St. 2d 97, 276 N. E. 2d 629 (1971). The Ohio tax was briefly discussed and properly described in the 1973 House Hearings as "unique . . . probably the only State in the 50 states that has such a tax."[7] The legislative history is silent regarding Congressional intent to prohibit general business or property taxes imposed on airlines, regardless of the measure or rate of the tax.

To support the argument that Congress did not discuss, and did not intend to prohibit, general business or property taxes that happened to be measured by gross receipts, we have reproduced under separate cover as a supplemental appendix those portions of the legislative history concerning Section 1513 and preemption of state tax power. This Appendix of Legislative History (hereinafter cited as Leg. Hist. App.) demonstrates the complete absence of any material which remotely suggests that Congress intended that Section 1513 should preferentially exempt airlines from the PSC Tax or from any other general state business or property tax.

This brief next sets forth representative extracts of this material in relative order of importance: (1) Conference Reports; (2) Senate and House Bill Reports; (3) Congressional Record; and (4) Hearings.

1. The Entire Legislative History Conclusively Demonstrates That Congress Did Not Intend To Invalidate A Tax Like The PSC Tax To The Extent It Is Measured By Gross Receipts:

a. The 1972 House Conference Report On S. 3755.[8]

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[7] Bills to Amend the Airport and Airway Development Act of 1970: Hearings on H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. 246 (Mar. 14, 15, 20, 22, & 27, 1973) (Leg. Hist. App. at 142).

[8] H. R. Conference Rep. No. 92-1543, 92d Cong., 2d Sess. (Oct. 5, 1972) (Leg. Hist. App. at 93).

In material part, this report indicates that the House agreed to the Senate version of what ultimately became Section 1513. The only explanation of Section 1513 that would aid in its interpretation is that it was intended "to prohibit certain State taxation of persons in air commerce."[9]

b. **The 1973 House Conference Report On S. 38.**[10]

In material part, this report refers to the 1972 Conference Report on S. 3755.

c. **The 1972 House Report On H. R. 14847.**[11]

On page two of the report, the subcommittee noted as follows:

> On June 19 and 23, 1972, the Subcommittee on Transportation and Aeronautics held hearings on H.R. 2337, H.R. 10326, H.R. 10470, H.R. 10864, H.R. 14847, and H.R. 14991. The hearings revolved around the question of State and local taxation and the Federal share of funds to be used for airport construction, maintenance, and improvements. Interest in the hearings was augmented by recent United States Supreme Court cases [*Evansville*] upholding the constitutionality of enplaning charges on passengers using scheduled aircraft. . . . Witnesses representing virtually all segments of air transportation appeared. Their presentations ranged from recommendations against any legislation to recommendations of a permanent prohibition *against State and local charges on air passengers.*

Id. at 2 (emphasis added except case citation) (Leg. Hist. App. at 68-69).

The House bill contained a moratorium to study the head tax problem and the 1972 House report discussed enplaning and/or deplaning charges that were upheld by

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[9]*Id.* at 1 (Leg. Hist. App. at 93).

[10]H. R. Conference Rep. No. 93-225, 93rd Cong., 1st Sess. (May 24, 1973) (Leg. Hist. App. at 179).

[11]H. R. Rep. No. 92-1279, 92d Cong., 2d Sess. (Aug. 2, 1972) (Leg. Hist. App. at 66).

this Court in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U. S. 707 (1972). The House report noted that, subsequent to *Evansville*, fourteen other airports enacted enplaning and/or deplaning charges.

d. **The 1972 Senate Report On S. 3755.**[12]

In material part, the report of S. 3755 is reproduced *verbatim* in the 1973 Senate report on S. 38.

e. **The 1973 House Report On H. R. 6388.**[13]

On page 2 (Leg. Hist. App. at 159-60), this report noted that it extended from July 1, 1973 to December 31, 1973 "the period of time within which certain State or local taxing authorities which have been levying or collecting *airline passenger head taxes* will be exempt from the prohibition against such taxes provided by the reported bill." The committee, under the section titled "Purpose," noted in part:

> H.R. 6388 . . . *prohibits the levying and collecting, by State and local governments, of passenger use taxes ("head taxes") on persons traveling in air commerce or on the sale of air transportation.*
>
> . . . .
>
> H.R. 6388 prohibits the so-called "head tax" by any governmental agency other than the United States, on the carriage of persons in air transportation.

Id. at 2-3 (emphasis added) (Leg. Hist. App. at 160).

Under the heading, "Background and Need," the Report continues:

> *More than forty State and local governmental agencies have enacted a passenger user tax, the so-called "head tax," in an effort to generate new revenue.*
>
> . . . .

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[12]S. Rep. No. 92-1005, 92d Cong., 2d Sess. (Aug. 1, 1972) (Leg. Hist. App. at 62).

[13]H.R. Rep. No. 93-157, 93rd Cong., 1st Sess. (Apr. 19, 1973) (Leg. Hist. App. at 158).

Congress never intended for local and State agencies to raise money for airports by the use of such taxes. The Committee feels that the head tax is an unnecessary burden on interstate commerce, that it is discriminatory, and that it has a stifling affect on air transportation.

. . . .

The Committee reported legislation (H.R. 14847) on July 26, 1972 which would have authorized the Civil Aeronautics Board to conduct a one-year study to determine the financial needs at airports which are funded in whole or in part at a State or local level. In order to give the Congress time to review such investigation an 18-month moratorium on the so-called head taxes was passed. The House passed H.R. 14847 with amendments on August 18, 1972.

The Senate Commerce Committee reported a different measure on August 1, 1972, and it passed the Senate on August 10, 1972, (S. 3755).

The conferees met and agreed to a compromise in October 1972.

. . . .

The Committee has also extended an exemption until December 31, 1973 for several airports using the head tax. States levying and collecting the head tax before May 21, 1970 (the date the Airport and Airway Development Act of 1970 became law) are exempt from the prohibition until December 31, 1973. . . .

Id. at 4-5 (emphasis added) (Leg. Hist. App. at 162-64).

f. The 1973 Senate Report On S. 38.[14]

The purpose of S. 38 was explained in the 1973 Senate report as follows:

> The legislation to provide increased Federal participation in airport development grants is required because of the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the nation's system of publicly owned airports. The

[14] S. Rep. No. 93-12, 93rd Cong., 1st Sess. (Feb. 1, 1973) (Leg Hist. App. at 108).

funds required to increase the Federal share of airport development grants will come from the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970. The fund is funded from revenues from user taxes on aviation system users and contains and will contain adequate revenues to cover the cost of the increased Federal assistance.

. . . .

The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

Id. at 4 (emphasis added) (Leg. Hist. App. at 111).

Under the heading, "Background and Discussion," the report noted:

Under the Act, substantial new and increased taxes were levied upon aviation users to support the capital development program.

Id. at 7.

S. 38 contains a prohibition on State taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports —namely the passenger head tax. This provision will be discussed later but *the Committee points out here that in denying government agencies potential revenues from passenger head taxes, it is also responding to the local need for greater Federal assistance in airport grants.*

Id. at 14 (emphasis added) (Leg. Hist. App. at 112).

Under the heading "Prohibition of State and Local Taxation," (*id.* at 17) (Leg. Hist. App. at 112-14) this report further comments:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972, Supreme Court decision . . . [*Evansville*] . . . While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.
>
> . . . .
>
> Recent experience with the Philadelphia tax is indicative of the chaos which such local taxation works on the national air transportation system. The head tax brings on confusion, delay, anger and resentment and cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes. Two newspaper accounts are printed below describing the situation created by the Philadelphia head tax which became effective July 1, 1972.[15]

The report then noted that:

> Whether the passenger pays the head tax, or it is absorbed by the airlines, the end result is to raise the cost of air travel.
>
> . . . .
>
> The head tax imposes a flat rate on passengers, regardless of the distance traveled by the passenger. Therefore, the "short haul" passenger, paying a $1 tax has the price of his ticket increased about 10% while a transcontinental passenger's ticket increases less than 1%. . . .
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> . . . .

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[15]These newspaper accounts describe the reaction of individual air passengers to the imposition of head taxes. The accounts are replete with quotes from irate air passengers, who were subjected to a head tax at the Philadelphia airport ticket counter.

> Quite clearly, if head taxes are to be used for non-aviation purposes or for programs which don't benefit the airport system where it is collected, such taxes are not equitable. . . . Air passengers are already being charged sufficiently at the Federal level through an 8% user charge on domestic tickets and $3 per person on international tickets, and it is not necessary to place a double burden on them.
>
> The bill reshapes the airport grant-in-aid program making use of the air passenger's money that is already in the Aviation Trust Fund, thereby making it easier for local communities to finance airport needs and ensuring that there is no need to resort to local head taxes.

Id. at 22 (Leg. Hist. App. at 119-21).

In the "Conclusion" to its report, the Senate Committee on Commerce stated:

> S. 38, as explained above provides a great new source of funds for airport development and improvement throughout the United States. The bill, if enacted, will reduce substantially the reliance on locally-generated funds for airport development and will place a greater burden and responsibility on the United States to encourage, promote and finance aviation facilities which are required in the national air transportation system.
>
> The bill provides that the cost of this increased Federal participation will be borne by the users of the system, not the general taxpayer. . . .
>
> . . . .
>
> . . . [T]he Committee views S. 38 as an aviation development package—the components of which cannot be separated. We believe that if the ***prohibition on local head taxes*** was not a part of the total new program, there would be need to re-evaluate the increased Federal funding for airport development projects called for in S. 38. ***If local taxes on passengers and air carriers*** are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program. If local

head taxes become a significant airport funding mechanism the public interest may well require a reduction in Federal user taxes and a diminution of Federal participation in airport development projects.

Therefore, by prohibiting state taxation on passengers or on air transportation, the Committee has accepted greater responsibility for U. S. assistance believing that the two actions must be viewed together and that neither should stand alone without the other.

Id. at 25-26 (emphasis added) (Leg. Hist. App. at 121-22).

g. **The 1972 And 1973 Congressional Record.**

Nothing in the extensive Congressional Record debates illustrates that Congress intended to invalidate a tax like the PSC Tax. To facilitate review, however, major portions from eighteen debates are reproduced in the separate Appendix of Legislative History.

h. **The 1972 House Hearings.**[16]

These hearings illustrate overwhelming concern with post *Evansville* head taxes. The testimony of Whitney Gillilland, relied upon by the airlines to support the inclusion of "on the gross receipts derived therefrom,"[17] is located at 51-59 (Leg. Hist. App. at 37-51). Mr. Gillilland recommended an eighteen month moratorium to study the "head tax" problem. His testimony thus supports a restrictive approach, not the broad sweeping preemption relied upon by the airlines.

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[16]Bills Concerning State Taxation and the Federal Share of Funds to be used for Airport Construction, Maintenance, and Improvements: Hearings on H. R. 2337; H. R. 14847, and H. R. 10326 (and identical bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce; 92d Cong., 2d Sess. (June 19 & 23, 1972) (Leg. Hist. App. at 34).

[17]Br. for Aloha Airlines at 20-21; Br. for Hawaiian Airlines at 19.

i. The 1972 Senate Hearings On S. 2397, S. 3302, S. 3611, And S. 3755.[18]

In his opening statement, Senator Cannon (the prime sponsor of the bill) stated as follows:

> Quite simply, S. 3611 prohibits State and local governments from levying taxes, use fees, or other charges on passengers in air transportation.
>
> . . . .
>
> . . . Today's hearing is intended to provide an opportunity for all interested parties to this controversy to present to the committee their views as to whether the Federal Government is to prohibit local taxation of airline passengers.

Id. at 129-30 (Leg. Hist. App. at 7-8, 9).

The text of S. 3611 simply provided: "Sec. 1113. No State (or any political subdivision thereof) shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation."[19] In regard to an inquiry by Senator Stevens as to whether the bill would apply to landing fees, Senator Cannon stated: "the language as it was drafted by Senate Legislative Counsel . . . was intended to be directed toward the head tax."[20] Statements of various witnesses that appeared before the Committee reiterated time and time again the problems related to the proliferation of head taxes. Mr. Tipton, President of the Air Transportation Association of America, testified orally[21] and submitted a prepared

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[18]Bills to Amend the Airport and Airway Development Act of 1970: Hearings on S. 2397, S. 3302, S. 3611, and S. 3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2d Sess. (Apr. 25 & 26, June 12, 1972) (Leg. Hist. App. at 6).

[19]*Id.* at 134 (Leg. Hist. App. at 10).

[20]*Id.* at 157.

[21]*Id.* at 163-68 (Leg. Hist. App. at 17-22).

statement.[22] All of his testimony and every statement in his prepared statement refers to state and local head taxes.[23]

In the conclusion to his statement the ATA President recites: "The ADAP changes, *along with the prohibition of state or local head taxes,* would assure the sustained development of the nation's airports in conformity with a uniform, national plan."[24]

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[22] *Id.* at 168-74 (Leg. Hist. App. at 22-33).

[23] The headings of Mr. Tipton's prepared statement begin as follows:

1. State and local head taxes are inconsistent with the uniform national program.
2. State and local head taxes would complicate and burden air travel.
3. State and local head taxes add to travel costs and inhibit air travel.
4. State and local head taxes aren't necessary.

Id. at 169-71 (Leg. Hist. App. at 24-27).

The following subheadings appear in Mr. Tipton's background statement titled "Facts About Head Taxes:"

1. A head tax is a "double tax" on the air traveler.
2. A head tax serves to discourage air travel.
3. A head tax penalizes the short-haul traveler much more than the long-haul traveler, even though they both make use of the same airport services.
4. A head tax tends to penalize the residents of the taxing community.
5. A head tax is an inequitable and discriminatory means of raising revenues to support a local airport.
6. A head tax is a "self defeating" attempt to provide funds for airport development.
7. A head tax encroaches upon our traditional freedom to travel.

Id. at 172-73 (Leg. Hist. App. at 31-33).

[24] *Id.* at 172 (emphasis added).

j. The 1973 House Hearings On H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, And S. 38.[25]

Representative Jarman, Chairman of the Subcommittee on Transportation and Aeronautics, at the commencement of the hearings, stated in part:

> The bills before us in the hearing which we are commencing this morning deal with the levying and collecting of service charges on enplaning passengers. Following a Supreme Court decision in [*Evansville*] upholding such charges, a number of local jurisdictions have taken steps to collect similar charges. We have the question as to whether there should be a Federal preemption in this area and whether local charges should be prohibited.

Id. at 1.

In commenting on this problem, Mr. Kuykendall stated: "the idea of the proliferation of added costs to the passenger is our overbearing concern here."[26] At the request of Mr. Dingel, the Department of Transportation submitted information showing that 44 localities had enacted head taxes as of March 1973[27] and that all of the taxes were local except for six state-owned airports in New Hampshire. Some of these taxes were collected by the airport authority and others were required to be collected by the airline carrier.

2. Legislative History Conclusion.

Nothing in the legislative history of Section 1513 suggests that Congress was concerned with anything other

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[25] Bills to Amend the Airport and Airway Development Act of 1970: Hearings on H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, and S. 38 Before The Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. (Mar. 14, 15, 20, 22, & 27, 1973) (Leg. Hist. App. at 132).

[26] *Id.* at 64.

[27] *Id.* at 65.

than direct or indirect taxes on users of air transportation, generally characterized in the legislative history as "head taxes." Furthermore, the legislative history ties the restrictions of Section 1513 (a) both to increased federal taxation of users of air transportation and to increased federal spending to support airport development. As a *quid pro quo* for imposing Section 1513 (a) restrictions on the states, Congress increased federal financial support for airport development and safety, thereby eliminating the need for local head tax revenues. This pattern indicates a Congressional intent not to disturb a state's general business tax or property tax imposed for general governmental purposes.

Nothing in the legislative history of Section 1513 (a) explains the phrase "or on gross receipts derived therefrom." Nor is there anything in the briefs of the airlines or their *amici* that in any way substantiates their claim that this phrase was added to Section 1513 (a) to prohibit the states from measuring the taxes specifically permitted by Section 1513 (b) by the gross receipts that airlines receive from air transportation.

In addition, nothing in the Congressional history of Section 1513 supports *any reason* why the PSC Tax should be held invalid, irrespective of its measure. The measure of this tax by methods other than gross receipts, which admittedly is beyond the prohibition of Section 1513 (a), could impose an economic burden on the airlines that is equal to or greater than the burden imposed by the PSC Tax as presently measured by gross receipts. Significantly, the testimony and written statements of the ATA President neither mention nor discuss restricting general business or property taxes on airlines. On the contrary, he specifically stated that the airlines were will-

ing, ready and able to pay their share of general business taxes that did not discriminate against airlines or the users of air transportation services. [28] The ATA testimony, and the delay of the airlines in bringing these actions, indicate that they initially believed that Section 1513 did not restrict the measure of any taxes expressly permitted by subsection (b).

In sum, the legislative history, in conformity with both a rational and a technical interpretation of Section 1513, demonstrates that the PSC Tax is not a tax prohibited by Section 1513 (a).

III. As A Matter Of Statutory Interpretation, Section 1513 Does Not Prohibit Hawaii's PSC Tax As Applied To Airlines, Even Though The PSC Tax Is Measured By Gross Receipts From Air Transportation.

A. Introductory Considerations.

On its face, Section 1513 raises issues of statutory interpretation. If this were not true, the airlines would not have voluntarily paid the taxes in question for several years after Section 1513 was enacted. Furthermore, even if the language of Section 1513 is unambiguous on its face, as contended by the airlines and their *amici*, applicable rules of statutory construction and the legislative history leading to its enactment should still be considered. For, "[t]he meaning to be ascribed to a statute can only be derived from considered weighing of every relevant aid to construction."[29] Proper rules of statutory construction are particularly important here because the legislative history, as discussed above, refutes the airlines'

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[28] See *supra* note 3.

[29] 73 Am. Jur. 2d *Statutes* Section 147 (1974).

position. The airlines' suggested interpretation produces discriminatory, illogical, and inequitable results that were not intended by Congress and which are not supported by the voluminous legislative history.

B. Applicable Rules Of Construction.

Irrespective of the alleged unambiguity,[30] the legislative history and appropriate rules of statutory construction (see *supra* Part II) are relevant in formulating a reasonable interpretation and application of Section 1513. "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *FBI v. Abramson*, — U. S. —, 102 S. Ct. 2054, 2061 n.7, 72 L. Ed. 2d 376, 386 n.7 (1982) quoting *United States v. Monia*, 317 U. S. 424, 431 (1943) (Frankfurter, J., dissenting). The duty of the Court is "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Abramson* at n.7, quoting *NLRB v. Lion Oil Co.*, 352 U. S. 282, 297 (1957) (Frankfurter, J., concurring and dissenting).[31]

Even when there is no ambiguity in the literal language of a statute, this Court has historically recognized that the language cannot be construed to defeat the obvious intent of Congress or to reach an absurd result. See *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46 (1955); *Markham v. Cabell*, 326 U. S. 404 (1945); *United*

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[30]See generally Nutting, *The Ambiguity of Unambiguous Statutes*, 24 Minn. L. Rev. 509 (1939).

[31]The various principles of statutory construction that refute the position of the airlines are set forth in 73 Am. Jur. 2d *Statutes* §§ 145-46, 149, 153-55, 160, 259 & 269 (1974).

States v. American Trucking Association, 310 U. S. 534, 542-44 (1940); *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892). Thus, "if the literal import of the text of an act is not consistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified by the intention of the legislature." 2A *Sutherland Statutory Construction* 65 (C. Sands 4th ed. 1973) (citing *United States v. Alpers*, 338 U. S. 680 (1950) and *United States v. Public Util. Comm'n.*, 345 U. S. 295 (1953) as to "meaning or intent"; citing *United States v. Brown*, 333 U. S. 18 (1948) as to "absurd results").

In sum, rules of statutory construction require this Court to interpret all of the provisions of Section 1513 to produce a rational harmonious whole consistent with the Congressional intent and purpose behind ADAP.[32] The legislative history shows that Congress did not intend to prohibit the PSC Tax to the extent measured by gross receipts from air tranportation, while simultaneously permitting the same tax and all other general business taxes to the extent measured by any other method. Such an interpretation leads to absurd and inequitable results that are alien to any Congressional purpose in enacting ADAP.

C. Constitutional Standards For Preemption.

Section 1513 should also be interpreted in accordance with the constitutional standards for preemption.

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[32]While the airlines, the ATA, and the Solicitor General argue that these inquiries are unnecessary, they devote a substantial portion of their briefs to Congressional policy and history. (See Br. of Aloha Airlines at 18-23; Br. of Hawaiian Airlines at 16-27; Br. for the United States at 6-10, 12; Br. of ATA at 6-13).

As stated in *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952):

> It will not be presumed that a federal statute was intended to supercede the exercise of the power of the states unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not so lightly to be presumed.

In construing Section 1513, this Court should "start with the assumption that the historic police powers [or taxing powers] of the States were not to be superceded by the Federal Act unless that was a clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (bracketed material added). Under the preemption standard, the inquiry is whether Congressional enactment of Section 1513, the user taxes contained in I.R.C. Sections 4261 and 4271, and other provisions of ADAP, demonstrate a "clear and manifest purpose" (*id.*) to preempt the PSC Tax to the extent it is measured by gross receipts that the airlines have derived from their business activities and properties in Hawaii.

IV. The Plain Language Of Section 1513 Does Not Prohibit States From Levying General Business Taxes Or Property Taxes—Such As The Hawaii PSC Tax Or Other Taxes Permitted By Subsection (b)—Even Though The Permitted Taxes May Be Measured In Whole Or In Part By Gross Receipts From Air Transportation.

Contrary to the airlines' argument that 49 U.S.C. 1513 is unambiguous, its literal language supports the construction that Congress did not intend to preempt the PSC Tax to the extent measured by gross income from air transportation. This is demonstrated by an examination of the language of Section 1513 (a) in *pari materia* with

the language of Section 1513 (b) & (c),[33] and also by comparing Section 1513 (a) to the actual taxes enacted by Congress to raise revenues for airport development and safety (I. R. C. Sections 4261 & 4271).

In material part, Section 1513 (a) only prohibits the states from levying or collecting *a tax, fee, head charge, or other charge*, directly or indirectly: (1) *on* persons traveling in air commerce; (2) *on* the carriage of persons traveling in air commerce; or (3) *on* the sale of air transportation. At the end of this list in Section 1513 (a), Congress added the words "or on the gross receipts derived therefrom." Since a standard rule of statutory construction is that, absent evidence to the contrary, a provisory clause refers only to the last antecedent,[34] the phrase "on the gross receipts derived therefrom" applies only to charges "on the sale of air transportation." "Air transportation" is

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[33]Section 1513(c) permits a "head tax on passengers" to be imposed by airport authorities until December 31, 1973. If the term "head taxes," as used in subsection (c), did not refer to all the taxes referred to in subsection (a), the following unwarranted and absurd construction would follow: during the time period between enactment and the December 31, 1973 extension in subsection (c), Congress would be imputed with the illogical and unwarranted intent to permit head taxes but prohibit all other subsection (a) taxes other than head taxes.

[34]As stated 2A *Sutherland Statutory Construction* 159 (C. Sands 4th ed. 1973) (footnotes omitted):

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence."

Citing *Azure v. Morton*, 514 F.2d 897 (9th Cir. 1975); *Quindlen v. Prudential Ins. Co.*, 482 F. 2d 876 (5th Cir. 1973); *Mandel Bros. v. Federal Trade Comm'n*, 254 F.2d 18 (7th Cir. 1958); *Buscaglia v. Bowie*, 139 F.2d 294 (1st Cir. 1943).

defined in 49 U. S. C. 1301(10) to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."[35] Thus there is no prohibition on taxes or charges on the sale of air transportation in intrastate commerce, which is the sole issue in this case.[36]

Further, even if the "last antecedent rule" is not applicable, Hawaii's PSC Tax is not prohibited. However construed, subsection (a) prohibits only taxes that are expressly imposed *on* persons or *on* the carriage of persons traveling in air commerce, or *on* the sale of air transportation, or *on* the gross receipts from the sale of air transportation. The PSC Tax is not imposed *on* any of these *subjects of taxation*. Rather, the tax is expressly imposed *on* all carriers (including airlines) as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value." HRS 239-6. The PSC Tax is: (1) *measured* by the

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[35]In turn, "interstate air transportation," "overseas air transportation," and "foreign air transportation," are defined in 49 U. S. C. Section 1301(21) to mean respectively "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft in commerce between" points in one state and points in another state. In other words, it applies only to interstate or foreign transportation. The Solicitor General indicates, in the "Statement" in the Br. of the United States at 3, that the airlines are engaged in international air transportation in their inter-island flights in Hawaii because the flights pass over international waters. This argument places form over substance. It is not reasonable to assume that Congress intended that Section 1513 should be applied to intrastate flights over the Hawaiian islands any differently than to flights in the other forty-nine states.

[36]While the Br. for the United States at 3 indicates that the airlines' inter-island flights cross international waters and bring the airlines within the coverage of the Federal Aviation Act of 1958, this does not mean that the airlines are engaged in international or interstate commerce for taxation purposes. *See Federal Power Comm'n v. Union Electric Co.*, 381 U. S. 90, 95 (1965); *Polish National Alliance v. NLRB*, 322 U. S. 643, 649 (1944).

entire gross receipts from the airline business; (2) imposed on all intrastate carriers in lieu of an equivalent general business tax; and (3) reasonably classified as a property tax (See Part V below). It is not: (1) a discriminatory tax *on* airlines; (2) a tax *on* gross receipts; or (3) a tax *on* any *subjects of taxation* prohibited by Section 1513 (a).

That Section 1513 (a) was intended to prohibit only specific excise taxes imposed directly or indirectly on users of air transportation is supported by the language of subsections (b) and (c), as well as by a comparison of the language of Section 1513 (a) with the specific user taxes enacted by Congress to fund the ADAP program. Congress enacted subsection (b) to ensure that the language of subsection (a) could not be construed to embrace *subjects of taxation* (not their measures) other than those specifically enumerated in subsection (a). Subsection (b) limited subsection (a) to the *taxes* specifically contained in subsection (a). Subsection (b) expressly permits the states and their political subdivisions to impose *any other taxes*, with no reference to how they are measured, including "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services."

These taxes are general business or property taxes. They do not single out airlines for tax purposes. Unlike the Ohio tax, they are not directly or indirectly *imposed on* persons traveling in air commerce or *on the carriage of persons* traveling in air commerce or *on the sale of air transportation*. Irrespective of its measure, a property tax or a tax in lieu of a property tax (such as the PSC Tax) is imposed on the ownership and use of tangible and intangible property within the taxing jurisdiction. (See 1 T. Cooley, *The Law of Taxation* 869-73 (4th ed. 1924)). A franchise or other general business tax is imposed on

the exercise of a franchise or business privilege irrespective of how it is measured. *See Werner Machine Co. v. Director of Division of Taxation*, 350 U.S. 492 (1956). Thus the PSC Tax is not prohibited by subsection (a) and is a tax expressly permitted by subsection (b).

This interpretation of Section 1513 is not only supported by general rules of statutory construction and the preemption standards set forth in B and C above (cf. H.A. Jur. Stmt. at A-17 to A-20), but also by the legislative history of Section 1513 and the companion statutory construction rules of *noscitur a soccis* and *ejusdem generis*. *Noscitur a sociis* literally means "it is known by its associates." The legislative intent behind a certain word may be established by reference to associated or accompanied words. One of the longest standing and best articulated explanations of the principle is found in *Neal v. Clark*, 95 U.S. 704, 708-09 (1877).[37] This Court has recently repeated the *Neal* holding in *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (emphasis added):

> *The maximum noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, *is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.* See, e.g., *Neal v. Clark*, 95 U.S. 704, 708-709.

This rule is significant in interpreting Section 1513. Section 1513(a) employs the words "tax, fee, head charge, or other charge," a sequential enumeration of items with both general and specific characteristics. The terms "tax," "fee," and "head charge" are words of peculiar specificity. They refer to the enplaning and deplaning charges ("head taxes") that precipitated Congressional action after *Evans-*

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[37] For a brief discussion of this principle see, 2A *Sutherland Statutory Construction* 101 (C. Sands 4th ed. 1973).

ville and are expressly addressed in Section 1513(c). *See supra* note 33; Br. of the States of Alaska, Arizona, Oklahoma, Washington, and West Virginia at 17-18. Accordingly, even if Section 1513(b) and (c) are ignored, the *noscitur a sociis* rule demonstrates that Section 1513 (a) only prohibits taxes in the category of "head taxes or charges," not a general business tax or property tax like the PSC Tax. This interpretation is specifically supported by subsection (b), which limits subsection (a) to a specific category of taxes, and by subsection (c), which extends the effective date of subsection (a) restrictions to December 31, 1973 for the collection only of a "head tax on passengers."

The other relevant rule, *ejusdem generis* (meaning "of the same kind, class or nature"), is a subrule of *noscitur a sociis.*[38] The *ejusdem generis* principle is triggered when general words follow specific words in an enumeration describing a legal subject. The general words should be construed as embracing only objects or things similar in nature to those objects or things enumerated by the preceding specific words. *See Cleveland v. United States,* 329 U. S. 14, 18 (1946); *Lyman v. Commissioner,* 83 F.2d 811, 813 (1st Cir. 1936).[39]

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[38] *Id.*

[39] The inverse is also true: where general words are followed by specific words, the subsequent specific words operate to restrict the application of the prior general terms to things that are similar to those specifically enumerated. For example, in *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973), the court cited *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U. S. 222, 228-29 (1957), *MacEvoy Co. v. United States*, 322 U. S. 102, 107 (1944), and *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208 (1932) in support of its holding that:

> [t]he well-established doctrine of statutory construction denominated *ejusdem generis* . . . directs that a *general provision of a statute will be controlled and limited by subsequent statutory language more specific in scope.*

483 F.2d at 1135 (emphasis added).

Application of these two rules of construction yields a result that is consistent with Congressional intent to limit subsection (a) to a very narrow class of *taxes* imposed on users of air transportation, a class of taxes that are similar to the three user taxes enacted by Congress. These prohibited taxes do not include the PSC Tax or other Section 1513(b) taxes. Congressional intent to prohibit the states from levying (either directly or indirectly) the taxes listed in Section 1513(a) does not imply that Congress intended to restrict the means employed by the states to measure the taxes specifically permitted in 1513(b).

Further application of the rules *noscitur a sociis and ejusdem generis* to the *category or class of taxes prohibited* by subsection (a), compared to the *category or class of taxes permitted* by subsection (b), illustrates Congressional intent in enacting Section 1513. Congress intended to restrict only specific excise taxes on airlines *as a class* and to permit taxes on general businesses *as a class*. In other words, those taxes that single out users of air transportation or airlines as a class of taxpayers are prohibited by subsection (a). For example, assume that State A imposed a head tax of $1 on every resident of a state. This tax, being general in nature, would not be prohibited as to those residents that use air transportation because it is a tax on a class permitted by subsection (b). However, if State A imposed a head tax of $1 on users of air transportation, that tax would not be permitted because it is a tax on a class prohibited by subsection (a). This singling out of airlines for discriminatory taxation *as a class* of taxpayers was the basis of the ATA's testimony objecting to the Ohio tax. *See* 1973 House Hearings, *supra* note 3. The nature of the Ohio tax, as discussed by the ATA testimony, distinguishes the class of taxes prohibited by subsection (a) from the taxes permitted by subsection (b).

This analysis is not a matter of semantics or nomenclature. Head taxes, taxes on enplaning and deplaning of aircraft, or taxes on ticket sales can be repeated by various local jurisdictions in a discriminatory manner against users of air transportation *as a class* of taxpayers. This potential for abuse was a primary concern to Congress in enacting Section 1513 (See *supra* Part II/B at pp. 12-25). These prohibited taxes are readily distinguishable in incidence and effect from general taxes such as franchise taxes, net income taxes, property taxes, or sales and use taxes. General business taxes are related to the conduct of substantial business activities in the taxing jurisdiction and are not *specifically* imposed on an isolated taxable incidence in the taxing jurisdiction that is directly related to the flow of air commerce. Nor do general business taxes have anything to do with airport development, airport safety, or the imposition of taxes, either directly or indirectly, on persons using air transportation or using airport facilities. Neither can general business taxes be imposed to discriminate against either airlines or users of air transportation. Section 1513(b), by using the language "[n]othing in this section shall prohibit a state . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section" explicitly refers to specific kinds of taxes on a specific class of taxpayers. It does not restrict how the Section 1513(b) taxes on general classes of taxpayers are to be measured.

Significantly, the *subjects of taxation* prohibited by Section 1513(a) parallel the excise taxes actually imposed by Congress to Finance ADAP. Congress imposed three specific excise taxes on the users of air transportation under I.R.C. Sections 4261 and 4271: an 8% excise tax on the price of domestic flights; a 5% excise tax on the amount

paid for transportation of property; and a $3 head charge on international flights originating in the United States. These three specific excise taxes on air transportation are required to be *paid by the users* of the transportation. Congress imposed no special excise taxes or other special taxes which are required to be *paid by airlines.* It is thus reasonable to conclude that Congress enacted Section 1513(a) to preempt only comparable specific excise taxes or user taxes. This interpretation, which does not conflict with any ADAP policy, is supported by the express language of Section 1513, legislative history, rules of statutory construction, and constitutional preemption standards.

That Section 1513(b) permits general business taxes, irrespective of how these taxes are measured, is specifically supported by numerous decisions of this Court regarding the inclusion of exempt federal government obligations in state corporate franchise taxes that were measured by property, net worth, or net income.[40] It is also supported by decisions of the Court that have upheld the inclusion of gross receipts in the measure of state corporate franchise or property taxes. In these cases the Court held that a franchise tax or a property tax measured by gross receipts is not an unconstitutional burden

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[40]See *Werner Machine Co. v. Director of Division of Taxation,* 350 U. S. 492 (1956); *Pacific Co. v. Johnson,* 285 U. S. 480 (1932); *Educational Films Corp. v. Ward,* 282 U. S. 379 (1931); *Flint v. Stone Tracy Co.,* 220 U. S. 107 (1911); *Cleveland Trust Co. v. Lander,* 184 U. S. 111 (1902); *Home Ins. Co. v. New York,* 134 U. S. 594 (1890); *Society for Savings v. Coite,* 73 U. S. (6 Wall.) 594 (1867); *Hamilton Co. v. Massachusetts,* 73 U. S. (6 Wall.) 632 (1867). As stated in *Werner Machine,* "This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property." 350 U. S. at 494.

on interstate commerce and is not a tax imposed directly or indirectly *on* gross receipts from interstate commerce. See *Great Northern Ry. Co. v. Minnesota*, 278 U. S. 503 (1929); *Pullman Co. v. Richardson*, 261 U. S. 330 (1923); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912). Compare these cases with *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U. S. 326 (1887) and *Fargo v. Michigan*, 121 U. S. 230 (1887), in which this Court invalidated taxes *levied on* gross receipts from interstate commerce.

More recently, this Court recognized the distinction between a subject of taxation (its legal incidence) and its measure (how it is computed). This Court invalidated a Virginia tax levied on gross receipts in *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359 (1954) (*REA I*) and upheld the same Virginia tax, which was revised to levy the tax on property measured by gross receipts in *Railway Express Agency, Inc. v. Virginia*, 358 U. S. 434 (1959) (*REA II*). The rationale that distinguishes *REA II* and other comparable cases is stated as follows in 1 T. Cooley, *The Law of Taxation* 849 (4th ed. 1924) (bracketed material added):

> The reason for upholding such a tax [a tax *measured by* exempt gross receipts or capital stock as distinguished from a tax *on* gross receipts] is that the gross receipts or capital stock is not itself taxed but instead is merely used as a measure to value the tangible or intangible property, or both, belonging to the corporation inside the state.[41]

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[41] See also L. Tribe, *Constitutional Law* 365 (1978).

The intergovernmental immunity cases of this Court represent an analogous line of cases. These cases hold that the

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Thus, the PSC Tax (a property tax or tax *in lieu* of a property tax), which is *measured* by gross receipts, is not a tax directly or indirectly imposed *on* gross receipts. Neither is it a tax imposed on the *sale* of airline tickets or on the *sale* of airline freight transportation. Taxes on sales are analogous to the taxes imposed by the federal government on air transportation. In contrast, the legal incidence of a property tax is on the property owned and used in the taxing state. Irrespective of how it is measured, a property tax will be held invalid if the measure employed either discriminates against interstate commerce or is not "legitimate as an ordinary tax upon the property, valued with reference to its use." *Pullman Co. v. Richardson*, 261 U. S. 330, 339 (1929). *See also Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912).

All of the cases cited above demonstrate that a constitutional difference exists—regardless if the immunity is derived from federal statute or implied under the Constitution — between a tax *imposed on* a prohibited subject of taxation and a tax imposed upon a nonprohibited subject of taxation even though the latter includes the prohibited subject of taxation in its measure. The controlling question is the legal incidence of the tax. The airlines and their *amici* build their interpretation of Section 1513 (a) upon the faulty premise that there is

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scope of governmental immunity (express or implied) is dependent upon the legal incidence of the tax and not on its economic burden or its measure. *See United States v. City of Detroit*, 355 U. S. 466 (1958); *City of Detroit v. Murray Corp.*, 355 U. S. 489 (1958); *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110 (1954); *Alabama v. King & Boozer*, 314 U. S. 1 (1941); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937). *See also United States v. New Mexico*, 455 U. S. 720 (1980) where the legal incidence of the tax was controlling for federal intergovernmental immunity tax purposes.

no constitutional or statutory difference between a subject of taxation and its measure.[42] Their conclusion that the PSC Tax, which is properly classified as a property tax under decisions of this Court, is a tax *on* gross receipts because it is *measured by* gross receipts, is erroneous.[43]

V. The Hawaiian PSC Tax Is Not Prohibited By 49 U. S. C. 1513 Because It Has Been Reasonably Classified As A Property Tax By The Hawaiian Legislature, Courts, And Tax Administrator.

The Hawaii Supreme Court's historical analysis of the PSC Tax indicates that it is properly characterized as *a*

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[42]*Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274 (1977) repudiated a historical interpretation of the commerce clause and held that a corporate privilege tax measured by presumed interstate receipts derived from intrastate activities was not invalid as a tax imposed on the privilege of conducting interstate commerce. This holding does not mean that there is no constitutional difference, even under the commerce clause, between a subject of taxation and its measure. A ruling from this court that no difference exists between the subject of a tax and its measure would produce chaos in the state taxation of multistate-multinational businesses. For example, this difference has always been controlling in reference to a state's jurisdiction to tax. *See National Geographic Soc'y v. California Bd. of Equalization*, 430 U. S. 551 (1977); *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 80 (1938).

[43]This brief does not suggest that the measure of a tax is not relevant to determine what constitutes the true subject of taxation, since the measure must be reasonably related to the subject. For example, in *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912) this Court struck down an Oklahoma tax that purportedly constituted a property tax on going concern value measured by gross receipts from all sources. The Court invalidates the tax because the subject of the tax (property tax or going concern value) had no reasonable relationship to the measure of the tax (gross receipts). No such circumstance exists in this case and no one contends that it does.

property tax or a tax in lieu of a property tax.[44]

The PSC Tax is a direct descendant of the Public Utilities Tax, which was adopted in 1932. The airlines became subject to the Public Utilities Tax in 1933. (H.A. Jur. Stmt. at A-8). In 1939, the Public Utilities Tax was construed to impose a tax comparable to an *ad valorem* property tax. *Hawaii Consolidated Ry. Ltd. v. Borthwick*, 34 Hawaii 269, 281 (1937), *aff'd*, 105 F.2d 286 (9th Cir. 1939). In 1953, the airlines were exempted from the Public Utility Tax and subjected to the Hawaii General Excise Tax. In 1963, the legislature reconsidered this decision and decided to tax all intrastate carriers, including the airlines, under the Public Utilities Tax in order to avoid possible constitutional problems[45] with taxation of intrastate car-

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[44]In commenting on the PSC Tax, the Hawaii Supreme Court stated:

> The legislature has deemed the State levy "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value." HRS Section 239-6. We would not quarrel with this legislative characterization; . . . As our Territorial predecessors concluded, there is ample legal support for avoiding "the difficulties encountered in *ad valorem* assessments of the real and personal property of utilities . . . by substituting a tax upon gross incomes from utilities from utility business, upon net income from the same source or both." *Hawaii Consolidated Railway v. Borthwick, supra*, 34 Haw. at 280. For the formula "give[s] effect to the intangible factors which influence real values." *Railway Express Agency v. Virginia*, 347 U. S. 359, 364 (1954) (quoted with approval in *Railway Express Agency v. Virginia*, 358 U. S. 434, 442 (1959)). *See also Illinois Central Railroad v. Minnesota*, 309 U. S. 157 (1940).

H.A. Jur. Stmt. at A-22.

[45]In 1963, the Hawaii General Excise Tax was on appeal to the Hawaii Supreme Court. The issue was whether the tax was a permissible privilege tax or a tax on gross receipts that was prohibited by the Commerce Clause. In 1965, the Hawaii Supreme Court held the general excise tax to be a permissible privilege tax measured by gross receipts. *HC&D Moving & Storage Co. v. Yamane*, 48 Hawaii 486, 405 P.2d 382 (1965).

riers under the General Excise Tax. The legislature accomplished this by enacting the PSC Tax in 1963 to replace the Public Utilities Tax. The PSC Tax: (1) amended the scope of the existing public utilities tax to cover all public utilities, including all intrastate carriers; and (2) expressly defined the amended public utilities tax as a property tax.[46]

Since 1963, airlines and other carriers have been subject to taxation pursuant to HRS 239-6, which delineates the basis and the rates for assessing the tax against motor carriers and common carriers by air and water. This tax is assessed against the carriers as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value and is in lieu of the tax imposed by Chapter 237 [the general excise tax measured by gross receipts]." HRS 239-6 (bracketed material added).

The case at bar contains the "trinity of agreement by three state agencies," found to be so persuasive in *REA II* (358 U. S. at 440) since the PSC Tax has been interpreted by the Hawaiian courts and administered by the Hawaiian Director of Taxation as a property tax in conformity with its legislative history and explicit statutory characterization. This state perspective is not conclusive on this Court, "but it cannot be rejected unless it can be said to be ill founded." *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 454 (1918). It is thus evident that the PSC Tax can reasonably be characterized as a property tax

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[46]House Standing Comm. Rep. No. 792 (Finance Comm.), *reprinted in* 1963 House Journal 799; House Standing Comm. Rep. No. 850 (Ways and Means Comm.), *reprinted in* 1963 Senate Journal 950.

specifically permitted by Section 1513(b).[47] Furthermore, the gross receipts measure does not render the PSC Tax defective as a property tax as to the airlines (see *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912)) since the gross receipts of the airlines in question is approximately equal to the balance sheet value of their personal property located in Hawaii.[48]

The 1982 amendment of Section 1513, which added a new subsection (d) (reproduced in Br. for Hawaiian Airlines at A-2 to A-3) prohibiting discriminatory property taxation against the airlines,[49] shows that the PSC Tax is a permissible property tax under Section 1513 as amended. The PSC Tax is, therefore, *a fortiori*, a permissible property tax under Section 1513 as originally enacted without the prohibition against discriminatory property taxes. First, the tax complies with the anti-discriminatory standards of subsection (d): all commercial or industrial properties subject to a property tax

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[47]The Br. for the United States at 15 & 16 states that the characterization of the tax as a property tax is simply a matter of labels since "its tax base and its economic incidence, can be nothing other than a gross-receipts tax forbidden by 1513(a)." This statement is totally erroneous because the *measure* of a tax must be reasonably related to the *subject of taxation*. The Hawaiian PSC Tax, as a property tax, must be reasonably related to the value of the tangible and intangible properties, including going concern values, of the airlines in Hawaii. *See Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U. S. 317 (1968) and *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912).

[48]For purposes of the 1978 PSC Tax, Hawaiian Airlines personal property, including going concern value, was valued at $69,079,368 by using gross income as a measure. This amount is less than the actual value of its Hawaii personal property for the same year of $71,142,168 [(Book value of assets of $79,577,370) X 89.4%, the portion of its assets in Hawaii] equals $71,142,168. The book property figures include a small amount of real property which is separately taxed (cf. H.A. Jur. Stmt. at A-23 n.14).

[49]Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 701.

levy by Hawaii are taxed in a manner that does not discriminate against the airlines.[50] Second, subsection (d)(3) specifically provides that "[t]his subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." This implies that the term "property taxes" used in section 1513, as originally enacted and as amended, includes "in lieu" taxes or property taxes measured by gross receipts. Otherwise, there would be no purpose of including subsection (d)(3) in the 1982 amendment which excepted "in lieu" taxes used for airport or aeronautical purposes from the discriminatory property tax standards set forth elsewhere in subsection (d).

In sum, even if a literal reading of Section 1513 (before or after the 1982 amendment) is alone controlling,[51] there is no foundation for the airlines' argument that the PSC Tax is prohibited by subsection (a) and is not expressly permitted by subsection (b).

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[50]All public utilities, except airlines and other carriers taxed under HRS 239-6, are subject to the assessment and levy imposed under HRS 239-5 of the PSC Tax. Section 239-5 provides for taxation of the real and personal property of the public utilities covered by its provisions measured by a rate not "less than 5.885% or more than 8.2%" of the gross income from the public utility business. Although the airlines are taxed at a 3% rate on personal property only, and are taxed separately on real property under the real property tax law, the combined rate for both taxes (less than 3.2% for all tax years in question) is still substantially less than the 5.885% rate that the other public utilities pay for taxes on personal and real property. If the airlines were taxed at the same 5.885% rate as the other public utilities on both personal and *real* property, each airline would have paid between $688,000 and $1,472,000 more in PSC Taxes for each tax year in question.

[51]Since the airlines have the burden of proving the unconstitutionality of the PSC Tax to the extent measured by gross receipts from the air transport of persons, any ambiguity pertaining to the interpretation of either Section 1513 or HRS Section 239-6 should be resolved in favor of the State of Hawaii. *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951).

VI. Response To The Arguments Of The Airlines, The Solicitor General, And The ATA.

In stating the interest of the United States, the Solicitor General contends that "in our view, the Hawaii tax is a *flagrant violation* of federal law, and if it is sustained the prohibition contained in Section 1513 (a) will be *rendered ineffective*" (Br. for the United States at 1-2; emphasis added) because Congress enacted ADAP, including Section 1513, "to prevent *excessive taxation of airlines.*" (*Id.;* emphasis added). The United States then argues that the Hawaii Supreme Court "ignoring the plain terms of the congressional enactment . . . relied upon what it erroneously viewed as the underlying purpose of the federal statute" (*id.* at 6) to arrive at its decision which "threatens the fiscal integrity of . . . ADAP" (*id.*). The United States then suggests that "the decision below warrants summary reversal." (*Id.*)

In support of these statements, the United States relies upon Congressional interest in promoting aviation and air commerce, including the imposition of user taxes to support ADAP (*id.* at 6-7, 11-12). The United States further relies upon post *Evansville* Congressional concern with the proliferation of local head taxes that would duplicate the federal user taxes and impose an inequitable and potentially chaotic burden of taxation on users of air transportation. (*Id.* at 8-9). To establish that "[t]he problem posed" by the decision below "is neither isolated nor hypothetical" (*id.* at 10) the Br. for the United States refers not only to litigation involving general business taxes of New York, Arizona, and Alaska, but also to tax statutes of Delaware, Indiana, Maryland, Washington, and West Virginia, which allegedly "tax annual gross receipts or gross income without expressly exempting airline gross receipts." (*Id.* at 11, 11 n.15).

The Solicitor General's zeal to support the belated position of the Airlines has encouraged a flagrant misstatement of the interest of the United States and the purposes and policies of Congress in enacting ADAP, including Section 1513. First, Section 1513(a) will not be "rendered ineffective" if the PSC Tax is upheld by this Court. The legislative history reveals that Section 1513(a) was expressly enacted for the purpose of preventing the states from directly or indirectly imposing taxes similar to the three user taxes preempted by Congress. The PSC Tax does not conflict with this purpose. Second, the position of the United States that Congress enacted Section 1513(a) to prevent excessive taxation of airlines is based upon the erroneous assumption that the PSC Tax is "excessive" and that Section 1513 addresses this issue. If Congress had intended to relieve airlines from excessive property or general business taxes, it would not have enacted subsection (b). This subsection permits the states to impose general business taxes or property taxes on airlines, including the PSC Tax, irrespective of its rate or measure. The Solicitor General agrees, so long as these taxes are not measured by gross receipts from air transportation. Section 1513 (a) thus cannot be construed to protect airlines from excessive taxation, which is not germane to the subject matter of Section 1513. Third, that Congressional interest in promoting airport development and safety does not evidence an intent, policy, or purpose to exempt airlines from general business or property taxes that have been traditionally imposed by the states to defray general government costs.

Following the reasoning of the United States, the states should be prohibited from imposing nondiscrimina-

tory general business taxes on the trucking industry because of the Congressional interest in promoting and financing the interstate highway system. In short, nothing in the Br. for the United States, the legislative history or express language of Section 1513, supports the policy arguments of the Solicitor General. Congressional interest in air commerce and airport development does not manifest intent to exempt airlines from any general state business or property taxes.

After raising the basic policy issues discussed above, the Br. for the United States at 12-16 addresses the language of Section 1513. The Solicitor General first argues that Section 1513 is not ambiguous because Section 1513(b) is limited solely to *"taxes other than those enumerated in subsection (a)."* Id. at 13 (emphasis added). The Solicitor General then alleges that property taxes that are expressly excepted from subsection (a) by subsection (b) are prohibited by subsection (a) to the extent measured by gross receipts from air transportation. This argument is defective on its face. At best, this argument indicates that Section 1513 is ambiguous and its legislative history should be seriously considered by this Court. Indeed, the United States relies upon legislative history to support its argument.

After referring to testimony before the House Subcommittee's Hearing regarding Ohio's Discriminatory Tax —not a general business tax—imposed on gross receipts from air transportation of persons, the Solicitor General explains: "Thus, Congress considered a state taxing scheme similar to Hawaii's and deliberately chose not to modify the prohibitions against it." *Id.* at 14 (footnote

omitted). To paraphrase the Solicitor General's reasoning:

> Because a few members of the House Subcommittee heard some testimony concerning Ohio's discriminatory tax, which is specifically imposed only on airlines, this evidences Congressional intent to invalidate any general business or property taxes imposed upon airlines by any state, to the extent these taxes are measured by gross receipts from air transportation, even though they are specifically excepted from the prohibitions in Section 1513(a).

The Solicitor General fails to recognize that: (1) the subcommittee did not distinguish Ohio's specific excise tax on the transportation of persons by air, measured in reference to the enplaning and deplaning of passengers, from a head tax; (2) the Ohio tax was properly represented to the subcommittee as the only one of its kind in the nation;[52] (3) the Ohio tax singled out air transportation for discriminatory taxation; (4) nothing in the legislative history substantiates that Section 1513 was specifically designed to address the Ohio tax, unlike the Arizona tax considered by this Court in *Arizona Public Services Co. v. Snead,* 441 U.S. 141 (1979); and (5) the ATA, generally testified for the nation's scheduled airlines in reference to the Ohio tax, expressly stated that the airlines had no objection to paying their share of any general business taxes that did not discriminate against airlines.[53] *See* 1973 House Hearings, *supra* note 3. The Solicitor General, the Airlines, and the ATA have thus improperly

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[52]*See supra* p. 14.

[53]The Solicitor General notes that the House Subcommittee was perhaps persuaded by the objections of the ATA to the Ohio tax. Br. for the United States at 14. However, the ATA testimony only indicated that the airlines had no objection to general business taxes imposed on airlines, but did strenuously

(Continued on next page)

relied upon testimony about Ohio's discriminatory tax to draw erroneous conclusions regarding Congressional intent.

In order to bring the tax in question within the prohibition of Section 1513(a) the Solicitor General's Brief ends with the argument that, under Section 1513(a), no difference exists between: (1) a tax imposed directly on the sales of air transportation or receipts derived therefrom; and (2) a property tax measured by gross receipts. Contrary to this argument, a substantial constitutional difference separates a tax imposed on a prohibited subject and a tax whose measure includes a prohibitive subject. *See supra* pp. 37-40; Br. for the Multi-state Tax Commission at 21-25. Furthermore, there is a significant difference between singling out airlines for discriminatory tax treatment and exempting airlines from general business or property taxes to the extent measured by gross receipts.

The arguments of the airlines and the ATA generally parallel those of the Solicitor General, except for referenc-

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(Continued from previous page)

object to specific excise taxes that were imposed on airlines that were not imposed on any other businesses. Thus, the ATA's testimony in itself supports Hawaii's conclusion that Congress never intended to invalidate any general business taxes that were imposed on airlines, together with other classes of business, as part of an overall general business taxing program. Statements by unofficial groups promoting legislation have been utilized as interpretative aids only when the group sponsored and led the legislation through the legislature. *See* 2A *Sutherland Statutory Construction* 213 (C. Sands 4th ed. 1973) citing *Maneja v. Walalua Agr. Co.*, 349 U. S. 254 (1955); *United States v. Henning*, 344 U. S. 66 (1952); *Roland Electrical Co. v. Walling*, 326 U. S. 657 (1946).

es in the airlines' argument regarding the 1982 amendment of 49 U. S. C. 1513. See *supra* pp. 43-44 for our response to this argument. They require no additional comment here except that the State of Hawaii agrees with the statement in the ATA's brief that subsection (b) was enacted "to clarify that State taxes which did not duplicate the Federal tax were not prohibited." Br. for the ATA at 9.

CONCLUSION

For the reasons stated in this brief, and the *amicus* briefs submitted in support of the position of the State of Hawaii, it is respectfully submitted that this Court should affirm the judgment of the Supreme Court of Hawaii.

Respectfully submitted,

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Nos. 82-585 and 82-586

In The

Supreme Court of the United States

October Term, 1982

ALOHA AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

HAWAIIAN AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

LEGISLATIVE HISTORY APPENDIX TO THE BRIEF FOR THE APPELLEE, DIRECTOR OF TAXATION, STATE OF HAWAII

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[2]Bills Concerning State Taxation and the Federal Share of Funds to be Used for Airport Construction, Maintenance, and Improvements: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and identical bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (June 19 & 23, 1972).

[3]S. Rep. No. 92-1005, 92d Cong., 2d Sess. (Aug. 1, 1972).

[4]H. R. Rep. No. 92-1279, 92d Cong., 2d Sess. (Aug. 2, 1972).

[5]H.R. Conference Rep. No. 92-1543, 92d Cong., 2d Sess. (Oct. 5, 1972).

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[7]Bills to Amend the Airport and Airway Development Act of 1970: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. (Mar. 14, 15, 20, 22, & 27, 1973).

[8]H.R. Rep. No. 93-157, 93rd Cong., 1st Sess. (Apr. 19, 1973).

[9]H.R. Conference Rep. No. 93-225, 93rd Cong., 1st Sess. (May 24, 1973).

Nos. 82-585 and 82-586

In The

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LEGISLATIVE HISTORY APPENDIX TO THE BRIEF FOR THE APPELLEE, DIRECTOR OF TAXATION, STATE OF HAWAII

INTRODUCTION — OVERVIEW

The purpose of this appendix is to facilitate review of the legislative history to 49 U. S. C. 1513. As illustrated in the Table of Contents, lengthy excerpts from the conference reports, the bill reports, the Congressional Record, and the hearings appear in chronological order in this appendix. Only the major portions of each document that discuss limitations on the state powers to tax are reproduced.

The following bill numbers and dates are relevant:

House of Representatives

H.R. 2337	(Introduced Jan. 26, 1971)
Apr. 19, 1972	(*Evansville* decided)
H.R. 14847	(Introduced May 9, 1972) (vetoed by Nixon in 1972)
H.R. 14991	(Introduced May 16, 1972)
H.R. 627	(Introduced Jan. 3, 1973)
H.R. 2695	(Introduced Jan. 23, 1973)
H.R. 4082	(Introduced Feb. 7, 1973)
H.R. 4182	(Introduced Feb. 8, 1973)
H.R. 4213	(Introduced Feb. 8, 1973)
H.R. 4214	(Introduced Feb. 8, 1973)
H.R. 6388	(Introduced Mar. 29, 1973) (S. 38 passed by House in lieu of H.R. 6388 on May 2, 1973)

Senate

Apr. 19, 1972	(*Evansville* decided)
S. 3611	(May 16, 1972)
S. 3755	(June 27, 1972) (vetoed by Nixon in 1972)
S. 38	(Introduced Jan. 4, 1973) (passed by Senate on Feb. 5, 1973)

APPENDIX

118 CONG. REC. 17,468-69 (MAY 16, 1972)

By Mr. CANNON (for himself, Mr. Magnuson, Mr. Pearson and Mr. Cook):

S. 3611. A bill to amend the Federal Aviation Act of 1958 to prohibit State taxation of the carriage of persons in air transportation. Referred to the Committee on Commerce.

Mr. CANNON, Mr. President, I am today introducing legislation which is designed to prohibit a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million air travelers in this country. The legislation would prohibit the levying of State or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The bill is in response to a situation which has been brought about by a recent Supreme Court decision, upholding passenger head taxes enacted by New Hampshire and by Evansville, Ind., for "aviation-related purposes." While this decision has invited State and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

In the wake of this decision, a rash of proposals varying widely in rate, scope, and applicability, has broken out throughout the Nation. It is significant that revenues from some of these head taxes would not be used to provide funds for airport construction or operation, but would be used to nourish general fund coffers. For example, in Philadelphia, a proposed city ordinance will be considered tomorrow, which would levy a tax of $2 per passenger on passengers both arriving in and departing from that city. The revenues would accrue to the city's general fund not the Philadelphia airport. Other cities as well have leveled their sights at air travelers who are convenient, vulnerable, and captive targets. Certainly, we can anticipate the proliferation of such action.

Mr. President, Congress must act to protect the American air travel consumer from such discriminatory taxation, in observance of an old axiom that "In levying taxes and in shearing sheep, it is well to stop when you get down to the skin." The Nation's air travelers are already being heavily taxed to pay for airport facilities and airways modernization. In 1970, Congress passed the Airport and Airways Development Act, creating an Aviation Trust Fund, financed by user taxes to up-grade the Nation's airports and airways. Every passenger in air transportation pays an 8-percent excise tax on the price of his ticket to support these developments. Total user tax revenues will reach about $693 million this year. Since this tax money is earmarked for airport and airway improvements, there is no need to add an additional burden of taxation on these travelers, and in fact, it would be a breach of faith for Congress to stand idly by while this is done by other units of government.

Mr. President, at the present time the average value of a round trip airline ticket in the United States is about $85. Therefore, the average traveler today pays a Federal tax of $6.80, the revenues from which are reserved for aviation facilities development. In 1970, while the Committee on Commerce and the Committee on Finance were considering this legislation, it was our firm intent that the Federal excise tax be the only tax on passengers in air transportation. While the Supreme Court has said that Congress did not preempt this field in 1970, it was certainly our intention, in my opinion, to do so. At that time several States and local governments had attempted to levy head taxes on passengers in air transportation and it was widely assumed because of lower court decisions and qualified legal opinion that such taxes were unconstitutional as as undue burden on interstate commerce.

Despite the views we heard in 1969 and 1970 and despite the fact that the Federal Government presently taxes passengers at the rate of 8 percent on airline tickets, the High Court has opened the door wide to multiple passenger taxation.

Something must be done, and it is fitting that the Nations air travelers look to us for decisive action for this. In its decision, the Supreme Court seemed to invite congressional action for the Court pointed out that:

At least until Congress chooses to enact a nationwide rule, the power will not be denied to the States.

The legislation introduced today, provides the vehicle for Congress to make it clear that it will not allow indiscriminate levying of burdensome head taxes on citizens traveling in interstate commerce. Nor will we allow the growth of our national air transportation system to be impeded by abandoning it to the chaos of discriminatory taxation on air travelers.

I am acutely aware of the financial anemia many units of local government face today. No doubt, some would want to rely on local head taxes to provide matching funds for airport development. The Senate Aviation Subcommittee is currently considering reshaping the Federal airport grant program by raising the Federal ratio of funding to 75 percent. This would ease the fiscal pressure on local units of government and make local airport financing easier. Nonetheless, the national air transport system is too vital and important a national asset to be burdened by willy-nilly, discriminatory State and local taxes.

Mr. President, timely action on this legislation is essential, in order to forestall potential chaos in air transportation.

AMEND THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970 AND THE FEDERAL AVIATION ACT OF 1958

HEARINGS
before the
SUBCOMMITTEE ON AVIATION
of the
COMMITTEE ON COMMERCE
UNITED STATES SENATE
Ninety-Second Congress

Second Session
on

S. 2397

To Amend the Airport and Airway Development Act of 1970 in Order to Provide That the Federal Share Shall Not Exceed 75 per centum of Allowable Project Costs Except with Respect to Landing Aids

S. 3302

To Amend the Airport and Airway Development Act of 1970 in Order to Make Certain Airports Where the Landing Area Is Owned by the United States or an Agency Thereof Eligible for Assistance under Such Act

S. 3611

To Amend the Federal Aviation Act of 1958 to Prohibit State Taxation of the Carriage of Persons in Air Transportation

S. 3755

To Amend the Airport and Airway Development Act of 1970 to Increase the United States Share of Allowable Project Costs under Such Act; to Amend the Federal Aviation Act of 1958 to Prohibit Certain State Taxation of Persons in Air Transportation, and for Other Purposes

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April 25, 26, and June 12, 1972

Serial No. 92-67

[p. 129] AMEND THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970 AND THE FEDERAL AVIATION ACT OF 1958

Monday, June 12, 1972

U.S. Senate,
Committee on Commerce,
Subcommittee on Aviation,
Washington, D.C.

The subcommittee met at 10 a. m. in room 5110, New Senate Office Building, Hon. Howard W. Cannon (chairman of the subcommittee) presiding.

Present: Senators Cannon, Spong, Pearson, and Stevens.

OPENING STATEMENT BY SENATOR CANNON

Senator Cannon. The hearings will come to order.

Senator Cotton had intended to be with us this morning but he is en route from New Hampshire. Therefore, he will have permission to insert in the hearing record an opening statement along with a letter received from Senator Aiken, as well. At a later time we may receive a letter from the New Hampshire State attorney general or an expression of his position from Mr. Nammack, who is scheduled to testify, and the committee will supply written questions to the DOT from Senator Cotton to answer in writing.

Today's hearing is on S. 3611, legislation which I recently introduced on behalf of myself and Senator Magnuson, Pearson, and Cook. Quite simply, S. 3611 prohib-

its State and local governments from levying taxes, use fees, or other charges on passengers in air transportation.

The bill was introduced in response to a recent decision by the U. S. Supreme Court which upheld passenger head taxes enacted by New Hampshire and by the city of Evansville, Ind., for "aviation related purposes." In the wake of this decision, a rash of proposals, varying widely in rate, scope, and applicability, has broken out throughout the Nation. It is significant that revenues from some of these head taxes would not be used to provide funds for airport construction or operation, but would be used to nourish general fund coffers. Certainly, we can anticipate the proliferation of such action. Recently the cities of Saginaw, Mich.; Mobile, Ala.; and Sarasota, Fla., have enacted head taxes on passengers in air transportation.

The committee is concerned that such local taxation, enacted at varying levels for varying purposes, will have a chilling effect on the growth and development of air transportation. Wide-scale adoption [p. 130] of head taxes will lead to chaos and confusion in the air travel industry and will add to the already heavy tax burden being shouldered by passengers and shippers who use air transportation. As a result of the Airport and Airway Development Act of 1970, which this committee wrote and developed, aviation user taxes now total more than $600 million per year. These taxes are to be used strictly for aviation related development and are required to purchase and upgrade new and existing air transportation facilities in the United States.

Some of the State and local taxes which we have seen enacted very recently do not produce revenue to be used for aviation facilities development. Ironically, in 1969 the city of Philadelphia testified before this committee that as a result of its highly profitable operations the airport returned several millions of dollars per year profit to the city to finance other city programs. And yet it is the city of Philadelphia which is leading the way with the

most onerous and discriminatory head taxation which we have yet seen. In Philadelphia the enplaning passenger is now charged $2 to leave the City of Brotherly Love and, as if that were not enough, the city is also authorized to collect $2 from arriving passengers. In my view, such bold and discriminatory taxation cannot be permitted to hamper our air transport system.

I am well aware of the financial crisis facing many if not most of our metropolitan governments. No doubt many of these governments see the passenger head tax as an easy method for raising revenues from captive passengers using the air transport system.

Presently the committee is considering legislation to expand Federal assistance to local governments for airport development by amending the 1970 act. Senator Cook and I are strongly committed to providing more financial assistance, particularly to those smaller airports which are never operated profitably or even at a break-even point. In April, hearings were held on S. 2397 sponsored by Senator Cook and action will be taken on that legislation shortly.

During those hearings we had considerable discussion of the Supreme Court's head tax decision. Today's hearing is intended to provide an opportunity for all interested parties to this controversy to present to the committee their views as to whether the Federal Government is to prohibit local taxation of airline passengers. We will hear 13 witnesses who will speak to the merits of the legislation before us. In the interest of hearing all witnesses today we have asked each witness to confine his oral testimony to 10 minutes, and if the need be to submit more detailed written comments for the record. We will appreciate the cooperation of our witnesses in keeping to our time schedule.

. . . .

[p. 134] 92d Congress,
2d Session

S. 3611

IN THE SENATE OF THE UNITED STATES

May 16, 1972

Mr. Cannon (for himself, Mr. Cook, Mr. Magnuson, and Mr. Pearson) introduced the following bill; which was read twice and referred to the Committee on Commerce

---

A BILL

To amend the Federal Aviation Act of 1958 to prohibit State taxation of the carriage of persons in air transportation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title XI of the Federal Aviation Act of 1958 is amended by adding at the end thereof the following new section:

"State Taxation

"Sec. 1113. No State (or any political subdivision thereof) shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation."

Sec. 2. That portion of the table of contents contained in the first section of such Act which appears under the head [p. 135] ing "Title XI—Miscellaneous" is amended by adding at the end thereof

"Sec. 1113. State Taxation."

. . . .

[p. 136] . . . .

STATEMENT OF WHITNEY GILLILLAND, VICE CHAIRMAN, CIVIL AERONAUTICS BOARD

Mr. Gillilland. Good morning.

Mr. Chairman, members of the committee, the Civil Aeronautics Board appreciates the opportunity of presenting its views on S. 3611. This bill would prohibit the States from taxing the carriage of persons in air transportation.

The Supreme Court's decision last April in the *Evansville* case has opened the way for the imposition of local taxes directly on airline passengers. Surely it will not be long before passengers will be paying an extra dollar or so and maybe more at each airport they visit—unless the Congress acts otherwise. Philadelphia has announced a plan to collect $2 from the passenger when he gets on the airplane, and $2 when he gets off. Richmond has imposed a $1 tax on enplaning pas- [p. 137] sengers effective July 1. Mobile, Ala. is already collecting a departure tax. Saginaw, Mich. and Sarasota, Fla. have enacted such taxes.

Moreover, it appears that head taxes can be constitutionally imposed which would double penalize those passengers in our smaller cities who must use connecting air service to reach their destination. Such passengers might have to pay the tax each time they enplane, forcing double or treble taxes while their big city cousins would pay only once.

In addition to these haphazard and unequal effects on passengers, these new taxes undoubtedly will impose an expensive new administrative and procedural burden on the air carriers. Ultimately, passengers will pay for this burden as well.

For example, United Air Lines serves 88 cities in the United States and in 1971 it carried 26,048,000 passengers. If only three-fourths of its cities adopted a head tax, United would be forced to collect a head tax from almost 20 million passengers, accumulate the amount, and remit to 66 cities. This means that UAL's staffing on its ticket counters and/or at its boarding gates will have to increase and

so will the number of employees in its accounting department. Its added out of pocket cost could approach $2 million per year.

Moreover, if the tax is imposed in such a way as to require the carriers to collect either enplaning or deplaning head taxes or both at the point of sale, further expensive complications would arise in the settlement of intercarrier accounts, where the charges are collected by one carrier on behalf of others. If travel agents are requested to collect the taxes when selling tickets, but fail to do so, in all likelihood the unpaid taxes would have to be paid by the carriers. On the other hand, if taxes are collected when they are incurred, other problems arise. The practical administration of deplaning taxes seems exceptionally difficult. For example, suppose a passenger balks at paying $2 when leaving the plane. Is the carrier obligated to carry that passenger to the next stop?

Of course, the passenger is already paying 8 percent of his ticket as a Federal tax to help construct airports and provide improvements in safety. On international flights he pays a $3 Federal emplanement charge. These taxes reflect the user charge philosophy which is at the heart of the Airport and Airway Development Act of 1970.

Moreover, a portion of the ticket price covers the cost of airport facility rental charges. State and local taxes of various kinds, and landing fees at airports. Incidentally, the landing fees imposed on the Nation's airlines rose from $45.5 million in 1965 to $125.6 million in 1970, and the trend is continuing up. The Board is quite concerned about this trend, and its implications for fares.

In some cases, the increased taxes on airlines are not going to airport development at all. The Supreme Court is being asked to review an Ohio tax on the gross receipts of airline business done in Ohio. The revenue from this source is earmarked under Ohio law to pay the deficit in the policeman's and fireman's disability and pension fund. We understand that the Philadelphia tax was imposed as a general revenue measure.

Head taxes are ultimately justifiable under the Supreme Court's decision as a form of user charge. As we have seen, the user charge [p. 138] philosophy already causes the airline passenger to pay a good deal. Now, is it fair to put all the costs of building and running airports on the passenger?

Certainly, as a user the passenger should pay for a fair share of the benefits. But let us not lose sight of the fact that an airport benefits a lot more people than just passengers. It is not hard to imagine, for example, the economic catastrophe which would overtake Los Angeles, if Los Angeles International were shut down. The fact is, the whole community gains enormously from having an airport. Because of this, it is entirely proper, in the Board's judgment, for the whole community, through general taxes, to pay a fair share of the cost of having the airport.

Airport financing is complex. The "fair share" is hard to fix. Limiting State and local governments' power to tax users of airports may have an impact on the Federal share under the Airport Development Act. These problems need to be sorted out. The Board suggests that the Congress consider imposing a moratorium of a year, or year and a half, during which no passenger head tax would be allowed. That could give all interested parties a chance to consider in just what direction this country ought to go in terms of airport financing. In fact, the FAA and the DOT are very capable of studying this in depth, coordinating with the interested groups, and reporting back to Congress.

I might say that I think the CAB could make quite a contribution in that field, too, and I think we ought to because the economic operation of the air transportation system is a matter of which we are required under the statute to concern ourselves.

If the Congress were to do this soon, it would not be taking away from the States revenues they are already enjoying. Very few States or localities now have any head tax on airline passengers, since the conventional wisdom until recently has been that State or local governments

could not constitutionally impose head taxes on airline passengers. But by imposing the moratorium, Congress would be preventing the almost certain mushrooming of another kind of tax that could be extremely difficult to get rid of once the various States and localities adopted it and became dependent upon it.

For these reasons, Mr. Chairman, the Board recommends legislation like S. 3611 but having a duration of a year or 18 months that would prohibit States from adopting taxes that would be collected on a per-passenger basis.

I would add that in its present form, S. 3611 might be construed as prohibiting any form of user charge, such as landing fees. That could lead to some difficult problems if the Federal Government is not prepared to provide sufficient operating funds to replace landing fees. Clarafication of the bill's intent in this respect would be desirable.

Thank you.

Senator Cannon. Thank you, Judge, for your statement. I think the bill needs some clarification with respect to the landing fee situation. I am wondering, though, about the 1 year or 18 months moratorium as you suggest. Might that not lead all the municipalities and airport authorities to feel that at the end of that time they would be free to go ahead and be ready to put taxes into effect a year or 18 months from now?

[p. 139] Mr. Gillilland. I think that danger would be present, but it could be guarded against largely in the committee report in expressing the purposes of the legislation.

Senator Cannon. Of course, if we enacted a flat prohibition at this time, this would not preclude DOT and the Board from going ahead with a study and making a recommendation at some later time. Congress could later act to modify or repeal any legislation we might enact this year.

Mr. Gillilland. This is true. It strikes me, though, that having an expiration date would charge the people

concerned with going forward with adequate and complete studies, expeditiously bringing them along, and perhaps reaching a better resolution of the problem than this bill does.

Certainly, I think something needs to be done and very soon, but there are interrelated problems that might be looked into at the same time. One of them would be these increases in landing fees that are unequal in various airports and do not reflect themselves directly in fares. That is, the fares are not higher to and from a city that has a very high charge for use of its airport than elsewhere, thus, the fees get into carrier costs generally and have to be paid by the traveling public whether using that airport or not, people traveling between distant points over the system.

There are some other things of that sort that go on and it strikes me it might be well to take a look at this whole situation. It might or might not indicate legislation.

Senator Cannon. Well, if Congress made the determination that no moratorium or prohibition against the head tax were advisable, do you think it would be desirable to pass legislation providing guidelines so that at least the State and local governments would be required to follow some uniform policy with respect to any head tax that might be imposed?

Mr. Gillilland. Yes. As of right now, that is the way I look at it. One of the reasons, of course, we are for having the shorter period and compelling the study is exactly that. Local taxes of this sort may not be intrinsically wrong at all, but certainly it seems to me that they should be uniform and evenhanded and not create an unequal burden.

Senator Pearson. Do we know what the municipalities are doing with the money they have secured through this taxation?

Mr. Gillilland. I do not know that we have any information as to what it is actually used for. Some of them earmark it for aviation uses and some do not. This

Indiana case, for example. There the authorization seems to be limited, the taxes are to be used for aviation purposes and are not to extend beyond that. But some of these taxes do not make that a requirement. Whether they intend to use the money for aviation purposes, I do not know.

Senator Pearson. Has it only been on passengers for scheduled airlines or commuter airlines? Who is taxed under these ordinances? Is there any general pattern to these ordinances?

Mr. Gillilland. They are still commercial services. I think that is all that have been included up to this point as far as I know. Mr. Johnson states that in New Hampshire the tax is not levied against intrastate passengers.

[p. 140] Senator Pearson. That is all I have. Thank you.

Senator Cannon. It is a fact, is it not, that general aviation passengers so far are not covered by the taxes as presently imposed?

Of course, I can see that the next logical step for an airport authority or operator to, say would be, "We are going to put a gate out there and everybody that goes through the gate has to pay as they go through, whether they are flying on general aviation or whether they are going on a scheduled air carrier."

Mr. Gillilland. Very likely.

Senator Cannon. Thank you very much, Judge. We appreciate you being here.

Senator Pearson. I would just like to say for the record that I have been handed sort of a resume of these head taxes from place to place in New Hampshire, Indiana, Richmond, Philadelphia, and every one different in almost every detail as for qualification and the manner it is collected and the people that are subject to the tax.

Senator Cannon. The only thing common is the form of currency required.

Senator Pearson. That is right.

Senator Cannon. The next witness is Mr. Ronald Pulling, Acting Associate Administrator for Plans, Federal Aviation Administration Department of Transportation.

. . . .

[p. 163] . . . .

STATEMENT OF STUART G. TIPTON, PRESIDENT, AIR TRANSPORT ASSOCIATION OF AMERICA

Mr. Tipton. Mr. Chairman, members of the committee, I am Stuart G. Tipton, president of the Air Transport Association, which represents virtually all of the U. S. scheduled air carriers. At the outset, I would like to introduce on my left Mr. Warren Martin, vice president, public affairs, of the Air Transport Association, who has done much work on head taxes.

In response to the suggestion that the witnesses cut down their statements to 10 minutes, I would like to present my statement for the record, Mr. Chairman.

Senator Cannon. It will be made a part of the record.

Mr. Tipton. I will summarize it and try to stick to the 10-minute rule as closely as I can.

Many of the issues with respect to the proposal before the committee have already been argued and that will permit me to cut down my statement.

I could say at the outset that the scheduled airlines of the United States favor the enactment of S. 3611 because it deals with an issue that we have always thought would be a very difficult and important one and in the past few weeks we have found just how difficult and important that is, as we seek to appear throughout the country to discuss the possibility of head taxes and simultaneously try to develop methods by which we can collect those head taxes if they are ultimately imposed.

The Supreme Court, in passing upon this head tax issue, said it was legal but we must keep constantly in mind that the Supreme Court did not comment upon the wisdom

of having such a widespread series [p. 164] of taxes on individual passengers or measured by individual passengers. As a matter of fact, the Court, in sustaining the right of local communities to enact head taxes, said, "At least until Congress chooses to enact a nationwide rule, the power will not be denied to the States," thus indicating that the wisdom of local head taxes of this sort was left properly to the Congress of the United States and the bill before you properly responds to that invitation.

Let me sketch as briefly as I can the major reasons that we think this bill is good. We think first, and probably most important, the assessment of local head taxes is contrary to the national plan for the financing of the improvement of the airport system throughout the United States. Tax was levied on passengers; tax was levied on airlines, in order to provide a trust fund and a very large trust fund to help sustain the cost of airports in the airport system of the United States. The Congress at that point—at least this committee thought, I am sure, that there was no possibility of financing through head taxes, and so did we, but the Court has changed that and has caused this committee and others to concentrate on the impact of a tax on the national system that they created in the airport/airways bill.

I think that the national system that has been created is sustained completely from the standpoint of national policy since what has been created in the airport transport system is a national system, and its requirements, because of its speed and widespread character, demand national treatment for its problems.

The second major reason is the sheer complication which one encounters in trying to assess head taxes against passengers under the ordinances that have been put forward up to this present time. We have got a good understanding of this complication in Mobile the other day when the first head tax went into effect. There is no point in my describing the scene, but all I can say to this committee is that the passengers were mad. We do not like to have

our passengers mad. We have worked for years and spent thousands upon thousands of man-hours to take seconds off the handling of passengers. When you handle 70 million passengers a year who have paid well for speed, you are bound to do the best you can to cut down the inconvenience of handling tickets and handling other arrangements for air travel, and we have done the best we can. Sometimes we have not done so well, but this adds another one.

We figured in Mobile it was using up 45 seconds to make sure that the passenger owed the tax, collect the tax, give him a receipt, arrange for our accounting for the money collected—45 seconds. That's millions of man-hours that we have worked to cut 45 seconds off that time.

Senator Pearson. [Two pages of Questions and Answers are omitted here].

. . . .

[p. 166] . . . .

Mr. Tipton. . .

Let me make a comment as I conclude on the DOT recommendation. I had not heard that recommendation before and I feel impelled to comment on it because I think it is so thoroughly unwise. What DOT is saying is that the Congress and everyone should wait to see what happens with respect to this head tax problem. Now, one thing I do not think you have to look very far to see what is happening. I have to submit to the committee this morning a list of head taxes enacted and head taxes being considered by both State and local levels all over the country. That is happening. What is more, once it has happened on a very widespread basis, then it will be extremely difficult to [p. 167] pass legislation in the Congress which treats this head tax problem and the financing of airports on a national basis.

It would seem to me that their reasons for advocating that also were unsound. It seemed to be regarded that this was contrary to the revenue-sharing proposals. It is not contrary to the revenue-sharing proposals. The rev-

enue-sharing proposals recognize in many instances the wisdom of utilizing the Federal taxing power, both because of its national impact and because of the availability of extensive tax sources, and then contributing money yielded to the Federal Government to the local communities to help meet their problems. That is as good a description of the Airport/Airways Act as you can make.

Now, there, you have a case where the Congress has set a tax and a heavy tax on passengers for the purpose of returning it to communities where it could be used on the basis of national standards.

Now, there you have a case where the Congress has set a tax and what is attached to my testimony, a summary statement of the adverse effects of head taxes, editorials from Chicago and Richmond newspapers which are examples of very widespread adverse press comment on this from the standpoint of the passengers, a legal opinion on the constitutionality of congressional regulation of the taxation of interstate commerce. If I may have these additional documents put in I would appreciate it.

Senator Cannon. They will be made a part of the record, along with your prepared statement.

Mr. Tipton. I have got to make one final statement. That is, to lay to rest the question about landing fees being prohibited by the existing legislation. I thought, Mr. Chairman, you pretty much laid it to rest, but since I represent those that pay about $150 million in landing fees annually I thought it would be wise for us also to say that this legislation—it was not expected, as I understood it, to block out landing fees, and if amendments are necessary to continue the present landing fee and rental system of financing the airports we would have no objection to it.

Senator Cannon. So your support of the bill is not predicated upon the fact that some might interpret this to prohibit the charge of landing fees?

Mr. Tipton. It would be great, Mr. Chairman, but we——

Senator Cannon. I may say, in reviewing the bill, it appears that in the first part of the bill, section 1113, could be amended by just simply eliminating the words "the carriage of," so that the section would then read, "No State or any political subdivision thereof shall levy or collect a tax, fee or other charge, directly or indirectly, on persons in air transportation." That might get at the problem but this is something that we can give some study to.

Mr. Tipton. May I have permission to put forward a redraft of the legislation which will deal with that problem?

Senator Cannon. We would be delighted to have a suggestion from you.

Now, let me ask you a few questions here. Let's assume that there were no legislation enacted to prohibit the imposition of head taxes. Do you believe, in that event, that Congress should determine a maximum allowable tax?

[p. 168] Mr. Tipton. If the head tax legislation before the committee were not enacted—and we strongly urge that it be enacted for reasons I have stated—I think that there would be value in studying the standardization of any head taxes that are going to be put forward which would lead you right back again to the national system you established originally. As far as maximum levels are concerned, that would be one item of a standardized local head tax that might be considered.

We would, of course, regard that as definitely second-best. I would hope that we can continue the policy that the Congress has adopted up to now of maintaining a national system of taxation on passengers. Let me assure you, notwithstanding Don Reilly's comment that these collections can be made easily, this is a miserable job to try to work out some arrangement by which you can collect those taxes. We have come down really to the necessity of collecting that tax at the airport where the tax is levied. Our tickets are sold everyplace, travel agents here and travel agents in foreign countries, and it is really quite impossible to put

them on the ticket. You cannot expect an agent in Karachi really to know that Mobile, Ala., has a head tax, and if he is supposed to know it he probably won't, so you have to collect them at the airport.

Senator Pearson. What did you use in Mobile, what system, a stamp?

Mr. Tipton. One thing about Mobile that distinguishes it from Philadelphia is that it is a departing tax, and we collect it at the counter and give a receipt and then remit the proceeds to the city. It is a fairly simplified procedure there. We have working groups in Philadelphia today trying to figure out the Philadelphia situation which, of course, handles vastly more passengers than any other airport we have studied, and we have to collect those not only as the passengers go out, which is the Mobile system, but also as the passengers come in, and we really have not the faintest idea as of this moment, 2 weeks before the tax goes into effect, how we are going to do it. The situation in Philadelphia will be—we had a lot of difficulty in Mobile, but we haven't seen anything yet.

(The statement follows:)

Statement of S. G. Tipton, President,
Air Transport Association of America

Mr. Chairman, Members of the Committee, I am Stuart G. Tipton, President of the Air Transport Association, which represents virtually all of the United States scheduled air carriers. The airlines appreciate this opportunity to comment on the important issues which the Committee is considering today, for the decisions which are made as a result of this hearing will have a significant impact on the kind of air transportation system this nation will have in coming years. Certainly, decisive action is needed to make the airport development program more responsive to a changing pattern of needs, and provide for the safe and unhindered travel of nearly 500 million air passengers annually by 1983.

The issue of state and local "head taxes" on air passengers is a most urgent matter. Your timely action in holding hearings on legislation to prohibit such taxes is clear evidence of your concern for the nation's air travelers. It is further encouraging to note that legislation has been introduced in the House and that hearings have been set for next week, so we are hopeful that the dilemma now facing the nation's air travelers, and the airlines, will be resolved soon. If not, head taxes are going to be a headache for everyone.

Traditionally, airline passengers in the United States have been free of the annoying, burdensome and expensive head tax system which prevails in foreign countries. That situation has changed, of course, as the result of a decision issued [p. 169] by the U. S. Supreme Court on April 19. Seven cities have already enacted head taxes on airline passengers and many others are proposed by states, as well as cities. The airlines are deeply concerned that, unless Congress acts, air travelers will increasingly become targets for undue and discriminatory taxes, since the Supreme Court's decision apparently did not provide sufficient safeguards.

The Court upheld the validity of a city-imposed "use and service charge" of $1 for each enplaning commercial passenger at Evansville, Indiana, and a New Hampshire state law levying $1 for a passenger on large commercial airlines and 50 cents a passenger on smaller planes. In Evansville, the money, to be collected directly from passengers by the airlines, was earmarked for maintenance and improvements at the airport. In New Hampshire, the state fixed the charge directly on the airlines, with half of the revenue to go into the state aeronautical fund and the balance going to the airport authority. The Court, in this instance, ruled that a state and city could constitutionally impose a reasonable charge on interstate and intrastate air passengers in order to underwrite aviation activities. Yet, the decision did not sufficiently define the ruling, as, for example, what constitutes a reasonable charge, or just how far a state or municipality could go in levying head

taxes. Obviously, the decision raised more questions than it answered, and the result was predictable.

"The boys have found a brand new cotton patch" one of my Southern friends observed when the decision was issued, and he was right. Head tax proposals cropped up all over the country—nearly two dozen so far.

It is significant that revenues which would be derived from some of these local or state head taxes would not be earmarked for airport development, but would be used to gain financial windfalls. The most extreme example of this is Philadelphia which has imposed a $2 head tax on deplaning as well as enplaning passengers, with the funds going, unmarked for airport development, into the cities' general fund.

So the head tax has already grown from a 50¢ charge for air commuter passengers in New Hampshire to a $4 charge for a Philadelphia round-trip. We believe that the Supreme Court ruling is more restrictive than some municipalities have interpreted it to be and many of the perplexing questions raised by this decision can, and may be, decided by costly litigation. However, we think that a far better solution is for Congress to preclude such head taxes.

The Supreme Court invited Congressional action by concluding in its decision that ". . . at least until Congress chooses to enact a nationwide rule, the power will not be denied to the States". There are many reasons for Congress to act on the Supreme Court suggestion, but I would like to focus on the following:

1. State and Local Head Taxes Are Inconsistent With the Uniform National Program

In 1970, this Committee and Congress passed the Airport and Airways Act in order to provide for urgently needed improvements in the national air transportation system. An Aviation Trust Fund was created, along with a variety of user charges to assure adequate and sustained funding. Among others, an 8% tax was levied on domestic tickets and $3 per person on international trips. Congress

thereby established a uniform national program of taxation and funding for airport and airway improvements. This Committee, as you have indicated, Mr. Chairman, never intended that air travelers would be subject to state and local head taxes as well as the national user charges. That was our understanding too. Actually, we thought there was no danger of this because of the basic constitutional guarantee of a citizen's right to unhindered interstate travel. A U.S. Supreme Court decision which had prevailed since 1867 indicated that such taxes could not be constitutionally imposed. Relying on this historical precedent, Congress incorporated in the Airport and Airways Development Act, the concept of uniformity which is so essential to the maintenance of a national air transportation system.

2. State and Local Head Taxes Would Complicate and Burden Air Travel

The complexity of such taxes would create annoying and costly problems for air passengers and airlines.

The local head tax hasn't been in existence very long in this country, but in Mobile, where we've begun collecting a head tax, one thing is clear—it makes people mad. We don't like that. After all, the goal of the airlines has always [p. 170] been to make travel easier, more comfortable and pleasant. We'd like to avoid anything which will annoy or delay passengers. Yet, the collection of head taxes does pose this problem for us. For example, we found that collecting the head tax in Mobile adds at least 45 seconds per customer to our passenger handling time. The confusion and delay at a smaller station, though serious, is nothing compared to the chaotic situation expected at the major terminals.

Can you imagine what will happen on July 1st when the airlines start collecting $2 from each enplaning passenger and $2 from each arriving passenger at the Philadelphia airport as the city ordinance requires?

The airlines have already spent several thousand man hours in attempting to devise procedures which will make the flow of passengers through the airport as smooth as possible in order to minimize delays and annoyance. But we still foresee almost insurmountable problems of administration and collection. First of all we will have trouble identifying the passengers to whom the tax applies since through passengers are exempt. Every ticket must be examined to determine whether the passenger is beginning or ending his trip in Philadelphia, or catching a connecting flight or merely laying over.

Collecting from boarding passengers will be difficult enough. But think of what the passengers and the airlines are going to encounter in trying to collect the $2 head tax from people getting off the planes! Passengers will not owe the tax if they are connecting to another plane. Some passengers will not have the money. Some will not have change. Visitors arriving from foreign countries may not have any U. S. money—will the airline passenger agent be expected to understand and accept foreign currency? What a welcome to the City of Brotherly Love. Many arriving passengers will be anxious to greet relatives, friends or associates. They do not want any delays. Most of you know from experience that, at the end of a flight, passengers want to debark promptly. What does the airline do if the passenger refuses to pay? These are only a few of the problems we foresee.

In addition to the problem of dealing with increasing numbers of irate passengers, airlines are concerned with the difficult and costly burden of administration and accounting for such taxes. Though we don't know precisely what these costs would be, we anticipate that the cost of administration to the airline may, in some cases, exceed $1 per passenger.

3. State and Local Head Taxes Add to Travel Costs and Inhibit Air Travel

One end result of state and local head taxes is to raise the cost of air travel. If the passenger must pay a local

head tax, it adds directly to the cost of his trip. If head taxes are initially absorbed by the carriers, they become an added cost of operation which must ultimately be borne by the passengers. If the carriers had to absorb $1 for every air passenger carried last year, that would amount to $170 million, which is about equal to the amount the industry lost over the past two years. The airlines could not reasonably be expected to bear such a burden. A fare increase would have to be implemented. Thus, the air passenger would lose either way on state and local head taxes.

In addition, there would come a point when this added cost might make air travel uneconomical for some people, and thus inhibit the growth of the air transportation system, particularly in short-haul markets.

The head tax imposes a flat rate on passengers, regardless of the distance traveled by the passenger. Therefore, the "short haul" passenger, paying only a $1 tax on a $15 ticket has his fare increased 7½% while a long haul passenger's fare may increase less than 1%. Since the head tax so substantially increases the cost of a short haul flight, a person may very well turn to other modes of transportation. We believe that the addition in Philadelphia of $4 to the cost of a round trip fare will have this effect, causing severe problems for the substantial local and commuter air service there. The diversion of this traffic from such air carriers would have a damaging effect on service to many smaller communities as well.

The impact on the regional airlines of a hodgepodge scheme of local head taxes would be most serious and the Association of Local Transport Airlines adopted a resolution at its meeting in Atlanta, Georgia, on May 4, 1972, urging passage of legislation which would make invalid any head tax imposed by any city, state or airport authority.

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4. State and Local Head Taxes Aren't Necessary

In Philadelphia, as we've pointed out, new taxes are to go into the general fund apparently to ease the city's finan-

cial crisis. Some other cities have the same thought in mind. Quite clearly, head taxes imposed for nonaviation purposes, or for programs which don't benefit the airport system where they are collected, would not be equitable, and are not even within the scope of the recent Supreme Court decision.

The question then arises, are state or local head taxes required to raise funds for airport development? We believe they are neither necessary nor desirable.

The way to resolve the dilemma that both air passengers and some local communities now find themselves in, would be to adjust the federal airport program by making the following changes:

1. change the federal-local matching ratio for airport projects from the present 50-50% to 90-10%. This would ease the financial pressure on local communities for airfield improvements. Their is ample precedent for the 90-10% ratio, in the interstate highway program; and

2. make public areas of terminal buildings eligible for federal funding. This is the area of greatest need which is not covered under the Airport and Airways Development Act.

Conversations with a number of airport officials indicate that these changes in the airport development program will in almost all instances, solve airport capital improvement programs. But there remains the question of whether of not state or local head taxes can or should be used to meet airport operating requirements in those cities medium or smaller hubs which do not have sufficient volume and revenues to meet operating costs. The change in the federal matching share on airport improvements will help in some of these situations by easing the local capital required and, thus, relieving the debt service portion of the operating budget.

But I think we must, quite frankly, look at the problem and ask whether every single airport can expect to be com-

pletely self-sustaining or whether there may not be some situations where a certain amount of general support from the community is warranted.

Any locality considering the imposition of a head tax would do well to stop and consider just what that airport means to the economic well-being of the community it serves. An airport does many things: it provides jobs and payrolls for local residents, it purchases goods and services from local merchants, it brings businessmen and tourists to the area and acts as a magnet for new business and industry.

The airlines have studied the impact of air transportation on a number of localities around the nation. One of the most outstanding examples of what air transportation does for a community can be seen at Las Vegas. Last year 3.5 million visitors came to Las Vegas by air and spent almost $200 million in the area. Total payroll of persons employed at the airport alone amounted to $13,691,750.

In Denver, Stapleton International Airport employs over 7,000 people earning about $95 million annually. The total direct impact of the airport on Denver comes to almost $150 million. The study also found that air travelers spend almost $65 million each year there.

These are only two examples from a number of cities surveyed. The story is always the same. An airport, far from being a tax burden, is a vital economic stimulent which benefits the whole community. Air transportation, in many cases, is not only an important element in a community's economic health, but the key to its development.

Dallas wisely recognized this recently when it rejected a proposed $1 head tax. We hope that the same sense of civic pride and enlightened self-interest which that city displayed will be evidenced elsewhere, but the only real assurance that head taxes will be precluded must be provided by Congress.

The federal airport program can simply be reshaped to make use of the air passenger's money that is *already*

in the Aviation Trust Fund, thereby making it easier for local communities to meet their airport capital needs, without taxing air passengers.

The revenues in the Aviation Trust Fund from the user taxes will exceed $760 million in fiscal 1973 and continue to grow to the point 10 years hence where the annual income will amount to $2 billion. Even taking into account the other [p. 172] authorized uses of the Fund, there is and will be enough money to meet airport needs, if the appropriate changes are made so it can be utilized. I appeared before this Committee not long ago and explained the paradox that now exists, where revenues from user charges in the Trust Fund are accumulating and yet, many projects are being held in abeyance because of the difficulty of providing matching funds, due to the financial anemia of some communities and the inability of air carriers to underwrite airport development through landing fees and rentals.

Conclusion

The ADAP changes, along with the prohibition of state or local head taxes, would assure the sustained development of the nation's airports in conformity with a uniform, national plan. Our air system is truly national in nature and scope and the response to the problems which confront it should be made in accord with that principle. The national air transportation system has been painstakingly built up over the years into the finest in the world, and we should not allow it to be disrupted now.

Background Information on the Passenger Head Tax

The Supreme Court on April 19 ruled that state or local airport facilities may tax airline passengers. The court's vote reversed numerous State Supreme Court decisions which had ruled such taxes to be unconstitutional as obstructions to interstate commerce (California, 1962; Indiana, 1970; Montana, 1970; New Jersey, 1970).

The airline industry in arguing against the head tax concept said approval of the tax would lead to such taxes across the country, and indeed it has. Five cities have enacted head taxes already, the most ludicrous being a $2 tax on enplaning *and* deplaning passengers at Philadelphia.

It should be stressed that it is unnecessary for airports to tax passengers further for support; that the Airport/Airways Trust Fund was set up to meet their needs. The ratio of 50/50 local and federal participation should be changed to 90-10% and make public areas of terminals eligible for federal funds rather than double taxation of airline passengers.

Even a seemingly small $1, $2 or $3 head tax added to the average air ticket price of around $50 may well turn many people away from flying and retard the growth of air transportation and the business and commerce of the community.

Facts About Head Taxes

1. *A head tax is "double taxation" on the air traveler.*——To require the "users" of airport services to bear their fair share of the costs of those services has long been recognized as equitable. The airline passenger's ticket price, however, includes his share of the fees associated with aircraft landings and take-offs. To require the passenger to pay an additional sum simply for the act of enplanement or deplanement is to require him to pay twice for those same services. It should not be necessary since air travelers already pay 8% on domestic tickets, $3 on international, and there is sufficient money in the Aviation Trust Fund, as a consequence, to pay for airport development.

2. *A head tax serves to discourage air travel.*—It is inevitable that any time the "price" of air travel increases some people will be inclined to fall back on surface transportation. This results in fewer total people at airports, less total expenditures, a decrease in total revenues, and thus fewer jobs and less wage paid within the community.

3. *A head tax penalizes the short-haul traveler much more than the long-haul traveler, even though they both make use of the same airport services.*—For example: a head tax of only $1 may increase the short-haul passenger's ticket price by up to 10 per cent; the transcontinental passenger, however, bears a less than 1 per cent fair increase.

4. *A head tax tends to penalize the residents of the taxing community.*—By enacting a "head tax" on the act of enplanement or deplanement, travel to and from the taxing community simply becomes more expensive than travel to and from neighboring communities. This places the taxing community at a disadvantage while trying to attract new business with its accompanying increase in the tax base.

5. *A head tax is an inequitable and discriminatory means of raising revenue to support a local airport.*—An airport is "used" by many people who never actu- [p. 173] ally board an aircraft. Among these people are industrial lessees of airport property, commercial tenants such as restaurants and cocktail lounges, automobile rental agencies, newspaper and magazine vendors, life and property insurance agents, retail gasoline distributors, and even hotels, not to mention the large numbers of people present to welcome arriving passengers and "see off" those departing. The head tax separates a small portion of airport users and requires them to bear a disproportionate share of the cost of financing the airport.

6. *A head tax is a "self-defeating" attempt to provide funds for airport development.*—Airports have traditionally developed as a community service, bringing in business and industry to the surrounding area. Airports are economic gateways through which flow the United States mail, vast quantities of air cargo, vacation travelers and business people. Such activity generates a tremendous economic impact on the local community and should be encouraged, not discouraged by a tax which falls squarely on those people a community tries to attract.

7. *A head tax encroaches upon our traditional freedom to travel.*—By exacting a token on the "right to travel" over the "cost of travel", the head tax necessarily acts to restrict the citizen's freedom of movement. This restriction becomes even more distasteful here, in a nation founded upon the ideal of "individual freedom", than might be the case in some European countries having such a tax where this freedom is not part of the nation's cultural heritage. Unquestionably, a head tax serves to annoy and frustrate air passengers.

[Article from Chicago Today,
June 3, 1972 is Omitted].

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[Article from Richmond News Leader,
May 24, 1972 is Omitted].

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[The entire text of *Evansville-Vanderburgh Airport v. Delta Airlines, Inc.*, 405 U. S. 707 (1972) is reproduced at pp. 239-61 and is omitted here].

AIR PASSENGER FEES— STATE AND LOCAL CHARGES

HEARINGS

Before The

SUBCOMMITTEE ON
TRANSPORTATION AND AERONAUTICS

Of The

COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES
Ninety-Second Congress
Second Session

On

H.R. 2337, H.R. 14847, and H.R. 10326
(and Identical Bills)

Bills Concerning State Taxation And The Federal Share Of Funds To Be Used For Airport Construction, Maintenance, And Improvements

June 19 and 23, 1972

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[p. 1]

AIR PASSENGER FEES— STATE AND LOCAL CHARGES

Monday, June 19, 1972

House of Representatives,
Subcommittee on Transportation and Aeronautics,
Committee on Interstate and Foreign Commerce,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. John Jarman (chairman) presiding.

Mr. Jarman. The subcommittee will please be in order.

Today we are resuming our aviation hearings.

Several weeks ago, we concluded that portion of this series of hearings which dealt with cargo security.[1] A bill on that subject, H.R. 10295, has been reported by the subcommittee to the full committee and will be taken up in a full committee executive session as soon as possible.

This phase of the hearings concerns State taxation and the Federal share of funds to be used for airport construction, maintenance, and improvements.

In a recent Supreme Court case (*Evansville-Vanderburgh Airport Authority District* versus *Delta Airlines, Inc.*, decided April 19, 1972), the Court, with Justice Douglas dissenting, held that a New Hampshire statute levying service charges on enplaning passengers is constitutional.

Since then, a number of local jurisdictions have taken steps to assess similar charges. This will create a good deal of complexity and expenses for the interstate users of air transportation and for the carriers.

The argument can be made that there should be a Federal preemption in this field and that the Airport and Airway Trust Fund is the proper method through which to generate funds for the support of the country's airports and airways.

Judging from the recent hearings on the Senate side, this matter is quite controversial.

I assure that the subcommittee will consider the proposals before us very carefully.

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[1] "Cargo Security," hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 92d Congress, 2d session, held on May 18 and 19, 1972, Serial No. 92-70.

The text of the Supreme Court decision, the text of the bills pertaining to this hearing, and the agency reports thereon shall be placed in the record at this point, without objection.

(The material referred to follows:)

[The complete text of *Evansville-Vanderburgh Airport v. Delta Airlines, Inc.*, 405 U. S. 707 (1972) is reproduced at pp. 2-23 and is omitted here].

. . . .

[p. 24] 92d Congress
1st Session

H. R. 2337

IN THE HOUSE OF REPRESENTATIVES

January 26, 1971

Mr. Moss introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

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A BILL

To amend the Federal Aviation Act of 1958 to prohibit State taxation of the carriage of persons in air transporation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title XI of the Federal Aviation Act of 1958 is amended by adding at the end thereof the following new section:

"State Taxation

"Sec. 1112. No State (or any political subdivision thereof) shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation by any aircraft—

"(1) operated by an air carrier certificated by an agency of the United States to perform air transportation,

[p. 25] "(2) operated by any person subject to regulation by an agency of the United States in the performance of air transportation, or

"(3) operating to or from any airport financed, in whole or in part, from Federal funds."

Sec. 2. That portion of the table of contents contained in the first section of such Act which appears under the heading "TITLE XI—MISCELLANEOUS" is amended by adding at the end thereof

"Sec. 1112. State taxation."

. . . .

[p. 51] . . . .

STATEMENT OF HON. WHITNEY GILLILLAND, VICE CHAIRMAN, CIVIL AERONAUTICS BOARD

Mr. Gillilland. Thank you, Mr. Chairman, and members of the committee.

I have a short statement which I will read, if it meets with your approval.

Mr. Chairman, the Civil Aeronautics Board appreciates the opportunity to present its views on the four bills being considered by your subcommittee. Three of them would prohibit the States from taxing the carriage of persons in air transportation. Two of the three would, in addition, increase the Federal share payable on airport development projects from 50 to 62 percent, and provide for a 100 percent Federal payment with respect to "security facilities and equipment" for designated airports. The fourth bill would provide for Federal participation in costs incurred in the acquisition of safety equipment required for certification of an airport, under the Federal Aviation Act.

Regarding "head taxes," the Supreme Court's decision last April in the *Evansville* case has opened the way for the imposition of local taxes directly on airline passengers. It probably will not be long before passengers

will be paying an extra dollar or so, and maybe more, at each airport they visit—unless the Congress acts otherwise. Philadelphia has announced a plan to collect $2 from a passenger when he gets on an airplane, and $2 when he gets off. Richmond has imposed a $1 tax on enplaning passengers, effective July 1. Mobile, Ala., is already collecting a departure tax. Saginaw, Mich., and Sarasota, Fla., have enacted such taxes.

Moreover, it appears that head taxes may be constitutionally imposed which would doubly burden those passengers, particularly in our smaller cities, who must use connecting air services to reach their destinations. Such passengers might have to pay the tax each time they enplane, forcing double or treble taxes, while their big city cousins would pay but once.

[p. 52] In addition to such haphazard, unequal, and direct effects on passengers, these new taxes will undoubtedly impose an expensive new administrative and procedural burden on the air carriers. Ultimately, passengers will pay for this burden, as well.

For example, United Air Lines serves 88 cities in the United States, and in 1971 it carried 26,048,000 passengers. If but three-fourths of these cities adopted a head tax, United would be forced to collect them from almost 20,000,000 passengers, accumulate the amount, and remit to 66 cities. This means that United's staffing at its ticket counters and/or its boarding gates will have to increase, and so will the number of employees in its accounting department. The added out-of-pocket cost could approach $2,000,000 per year.

Moreover, if the tax is imposed in such a way as to require carriers to collect either enplaning or deplaning head taxes, or both, at point of sale, further expensive complications would arise in the settlement of intercarrier accounts, where charges are collected by one carrier on behalf of others. If travel agents are requested to collect them but fail to do so, in all likelihood the unpaid taxes would have to be paid by the carriers.

On the other hand, if taxes are collected when they are incurred, other problems arise. The practical administration of deplaning taxes seems exceptionally difficult. For example, suppose a passenger balks at paying $2 when leaving the plane. Is the carrier obligated to carry that passenger to the next stop?

Of course, a passenger is already paying 8 percent of his ticket as a Federal tax to help construct airports and provide improvements in safety. On international flights, he pays $3 Federal enplanement charge. These taxes reflect the user charge philosophy which is at the heart of the Airport and Airway Development Act of 1970.

Moreover, a portion of the ticket price covers the cost of airport facility rental charges, State and local taxes of various kinds, and landing fees at airports. It may be observed that the landing fees imposed on the Nation's airlines rose from $45.5 million in 1965 to $125.6 million in 1970, and the trend is continuing upward. The Board is concerned about this trend, and its implications for fares.

In some cases, increased taxes on airlines are not directed to airport development at all. The Supreme Court is being asked to review an Ohio tax on the gross receipts of airline business done in Ohio. The revenue from this source is earmarked under Ohio law to pay the deficit in the policeman's and fireman's disability and pension fund. We understand that the Philadelphia tax was imposed as a general revenue measure.

Head taxes are ultimately justifiable under the Supreme Court's decision as a form of user charge. As we have seen, the user charge philosophy already causes airline passengers to pay a good deal, but it would hardly be fair to put all the costs of building and running airports on the passengers.

Certainly, as users, passengers should pay for a fair share of the benefits. But let us not lose sight of the fact that an airport benefits a lot more people than just pas-

sengers. It is no speculation to predict, for example, that an economic catastrophe would overtake Los Angeles, if Los Angeles International were shut down. The fact is, a whole community gains enormously from an airport. Because this is so, it is [p. 53] entirely proper, in the Board's judgment, for a whole community, through general taxes, to pay a fair share of the cost of having an airport.

Airport financing is complex. The fair share is hard to fix. Limiting State and local governments' power to tax users of airports may have an impact on the Federal share under the Airport Development Act. These problems need to be sorted out. The Board suggests that the Congress consider imposing a moratorium of a year, or a year and a half, during which time no passenger head tax would be allowed. That should give all interested parties an opportunity to consider the direction this country ought to go in terms of airport financing. In fact, the FAA and the DOT are very capable of studying this in depth, coordinating with the interested groups and reporting back to Congress. Indeed, I am sure that the Civil Aeronautics Board would be in a position to make a substantial contribution.

If the Congress were to do this soon, the States would not be deprived of any revenues they are presently enjoying. Very few States or localities now have any head tax on airline passengers, since the conventional view until recently has been that State or local governments could not constitutionally impose them. But, by means of a moratorium, the Congress could prevent the almost certain mushrooming of a new kind of tax, that would be extremely difficult to get rid of, once the various States and localities adopted it, and became dependent upon it.

For these reasons, Mr. Chairman, the Board recommends legislation similar to provisions in H. R. 2337, H. R. 14847, and H. R. 14991, but having a duration of a year or 18 months, that would prohibit States from adopting taxes to be collected on a per-passenger basis.

I would add that present language in the three bills might be construed as prohibiting any form of user charge, such as landing fees. That could lead to difficult problems unless the Federal Government is prepared to provide sufficient operating funds to replace landing fees. Clarification of the bills in this respect would be desirable.

Pertaining to the proposals in H. R. 14847 and H. R. 14991 to increase the Federal share of airport projects costs, I have previously stated that limiting State and local governments' power to tax users of airports may have an impact on the Federal share under the Airport and Airway Development Act.

Until a determination is made as to what kind of a limitation, if any, is to be placed on State and local governments, the Board has no sufficient basis for further comment on these provisions.

We understand that the proposals, also contained in H. R. 14847 and H. R. 14991, that would result in the Federal Government paying the entire cost of "security equipment and facilities" are designed to assist in the struggle against air piracy or "skyjacking." The Board considers that the Government clearly has a major responsibility in this field and therefore believes that the Government should provide all or at very least the major share of the cost of the necessary facilities. No gap should be permitted to exist in our defenses against skyjacking simply because localities may not presently be financially able to share the costs.

The Board defers to the views of the Department of Transportation as to the desirability of provisions in H. R. 10326 which would provide [p. 54] for Federal participation in costs incurred in acquiring safety equipment required for the certification of airports under the Federal Aviation Act.

Thank you, Mr. Chairman.

That completes my statement.

Mr. Adams. Mr. Harvey.

Mr. Harvey. Thank you, Mr. Chairman.

Judge, if I understand what you are saying correctly, I find it is similar to what Mr. Shaffer said, only using a different approach.

In other words, Mr. Shaffer recommended that we do nothing at the present time and wait until we get a better understanding of this problem. You are recommending that we pass a complete prohibition at the present time, but make it one that terminates in 12 or 18 months. Is that correct?

Mr. Gillilland. That is correct.

I would think, and I have said so in the statement, that it isn't realistic to think that municipalities, many of which are hard pressed for revenue and are always seeking new ways and means, will not exploit this opportunity. I think they will and that these taxes will proliferate.

I believe they would be much harder to get rid of once the municipalities become dependent upon them, assuming that it is concluded by the Congress that they should be gotten rid of. I don't know what the ultimate result there might be.

But there ought to be a limited period of time here before the municipalities become dependent, in which the matter could be studied in depth. It is a very, very complex thing.

Mr. Harvey. Does CAB have the percentage of our citizens who use the airlines? Have you made any study of that?

Mr. Gillilland. You mean the total number of passengers?

Mr. Harvey. Yes. I know the Air Transport Association would have these figures but I wonder: Has the CAB made any study to determine what percentage of our citizens actually use the airlines?

Mr. Gillilland. What percentage of citizens? We have figures on that. I don't know what they are. We

could provide something for the record on that. It has been a rising percentage in recent years. It was not very great 10 or 14 years ago but I think it has increased.

Mr. Harvey. Would you care to approximate it this morning?

Mr. Gillilland. I don't believe I want to try to do it.

(The following information was received for the record:)

Proportion of the Population Who Use the Airlines

Surveying the adult population of the United States, the Gallup poll found that in June 1971 about 49 percent of the people had taken a trip on a commercial airline. This proportion has been rising slowly. In June 1970, the Gallup organization estimated it to be 47 percent. Back in 1965 the same survey placed it at only 38 percent.

Mr. Harvey. I have no further questions.

Mr. Adams. Mr. Kuykendall.

Mr. Kuykendall. Judge, it is good to have you with us today.

Am I to assume that in your present position that if you had to make a decision now on the current legislation, in lieu of the stopgap legislation that you are suggesting, that you would be against the collection of the local head tax?

Mr. Gillilland. That is true.

[p. 55] Mr. Kuykendall. In that case, I think you understand that we did reserve this area at the time we refused terminal access to the trust fund.

Mr. Gillilland. That is right.

Mr. Kuykendall. So, you are proposing that we reverse that philosophical decision.

What would you replace that money with? Increased Federal funding out of the trust fund?

Mr. Gillilland. I would not want to be understood as being opposed to the thought of a head tax completely.

The great danger here is——

Mr. Kuykendall. Wait a minute, Judge.

Mr. Gillilland. This is true.

Mr. Kuykendall. Isn't that like being a "little bit pregnant?" You either are or you aren't, aren't you?

Mr. Gillilland. No. You asked me whether in the present state of affairs, that I would favor prohibiting the head tax altogether. I answered the question "yes", and that is true. But that still does not mean that I might not be able to see some virtue in head taxes. I just don't think we know enough about it to pass on it.

Mr. Kuykendall. No one is disagreeing with you there.

Mr. Gillilland. I think the greatest trouble here is the lack of even-handedness in the business. It is true enough that the Supreme Court latched these taxes on to airport needs for construction and maintaining airports, but it also, I believe, had something to say about the nominal character of these taxes.

But it places the burden on the challenger of the tax. The devisers of taxes are pretty ingenious. I think we would find all sorts of taxes of this sort applied in different ways, and with different measures, all over the country if something isn't done, and that this would create an enormous burden on the movement of traffic and this is the thing that needs to be addressed.

I am not suggesting that the municipalities don't need funds but I think they need a greater discipline than just a determination by the Supreme Court that taxes of this kind are lawful.

Mr. Kuykendall. How did you interpret the more or less containing language that the Supreme Court used in describing more or less the limits of their permission?

Did you read it that the Supreme Court, itself, when granting this authority, tried to limit it?

Mr. Gillilland. Mr. Kuykendall, I think in the sense that they were not going to pass on any more than they had to as to what was lawful and what was constitutional in this instance, but I believe they left the door open for the exercise of all sorts of ingenuity in developing new taxes. I don't see how they can do anything else. They have to proceed on a case-by-case basis to deal with these matters. And for years and years it has been a shifting scene as to just what constitutes a burden on interstate commerce in this field.

I think the main thing is that we need to achieve a proper discipline. You could not even exclude the possibility, as I see it, that it might be better to increase the Federal tax and distribute some of that fund to the municipalities, or a percentage of it. I don't advocate any such thing at this time, but I think this whole field and its relationship to [p. 56] landing fees which have proliferated so greatly, ought to be studied in greater depth than it has been now, and perhaps the agencies could come forward at a later time with better and more sophisticated recommendations as to what this legislation ought to be than they can now. That is the reason we would favor a moratorium, so that that can be accomplished before the municipalities get dependent on this kind of revenue.

Mr. Kuykendall. I think you have gathered something about the temper of this committee and its concern. Those of us who seem to be opposing this legislation as it is written are definitely not objecting to tightening the boundaries and asking for uniformity and sensibility. I had one question I was going to ask you that might trap you a little bit but you have already answered it and trapped yourself.

Mr. Gillilland. Maybe.

Mr. Kuykendall. I wanted to kid you a little bit and I am glad to see you laughing.

You started out by saying that one of the justifications for requiring the community to take part of the responsibility for the airport expansion is the fact that an airport offers many more benefits than just those for passengers. And yet, you said there is a possibility that you might have to turn to the Federal Government for all 80-90 percent.

Mr. Gillilland. I made that a little too high.

Mr. Kuykendall. I wanted to kid you there, because I want to make the point that if we shift this burden to the passengers, the passengers won't be able to fly. That is a fact.

Mr. Gillilland. I was thinking about a shift, but I want to make it clear that I don't now advocate that, I may be very much opposed to it later on. It is just a possibility. But, as I see it at the moment, the shift would be as a device to gain uniformity and attain a similar amount of funds to the benefit of the municipalities that they would otherwise have.

Here, I think, is the thing to be borne in mind in that connection: The burden on the airport does not relate too much to the length of the journey the passenger has to pay for. You have got a similar burden, maybe not identical, but similar, from a passenger buying a $25 ticket to that from a passenger acquiring a $200 ticket.

So, I don't know that it is proper that the taxes be a percentage of the amount of the ticket in this instance. I just don't know.

What I do say is that this is a very complex thing and should be studied.

Mr. Kuykendall. I have mixed emotions about this percentage business, too, and Mr. Harvey's statement to me earlier caused me to have summary thinking.

But the point I want to make through my questions, Mr. Chairman, is that I don't want to, if possible, leave the illusion that we have much slack in this trust fund.

We don't have a slack and if we start shifting burdens to the trust fund we are going to have to increase the tax and the passenger is going to pay every dime of it. If we start doing these things and then have to cut back on our safety equipment in the future, we will be fooling ourselves.

So, if you have a trust fund with no slack in it and you put extra burdens on it, there is not but one source of money and that is the taxpayer.

Thank you, Mr. Chairman.

[p. 57] Mr. Adams. Congressman Thompson.

Mr. Thompson. Judge, one thing that concerns me of years is when you start talking about airports is that I don't want to see an airport take the airline passengers money and then use it for nonairport purposes.

I, personally, believe that the airports provide a very definite benefit to cities and regions beyond the direct revenue that is received.

I was in a seminar at the Arden-Hoe House about a year ago, a transportation seminar. At that time, the head of the New York City Port Authority made known to us that money was being taken out of the airport operations to subsidize the subways in New York City. I think the CAB should look into this matter because, by that time, I forget the precise figure, it was $14 or $16 million. I think that was the first time that it had ever been admitted; at least that is what several participants in the panel said; they had suspected it but it had never been admitted this had been done.

We talk about a head tax and this is, of course, the subject of our hearings here today. I have mixed emotions about it, mixed emotions because I know some airports do not receive revenues. I do not want in any way to take any money from safety purposes that would otherwise supplement a city's revenue but I would want to be absolutely certain that city or authority is not draining money from that airport for nonairways purposes as by

the statement made a year ago which is a fact in New York City Port Authority.

I would hope that the CAB would look into that further because that was a positive statement made.

Your job, of course, is in direct relationships with the economic spheres of the airlines and you can recognize your desire for uniformity.

Your idea for a 1-year moratorium appears to me to have merit more so than what the FAA proposed.

I am not asking you questions. I am simply making a statement. But I think you have a sound position in this matter.

I am concerned that if we are involved too much in inaction, you may see a proliferation and you might say one airport will charge $5 a head tax and the customer is going to be very upset when he finds he is paying more in one area than another.

I would like to congratulate you on your statement and urge that CAB look into the matter of whether or not airport authorities throughout the area possibly have some required mandatory reporting on fiscal accountability of the airports. In other words, if you take all of their concessions and everything else that goes in there, if they are draining money off of that airport, then, somehow, I would hope that, I don't know if CAB would be the proper agency, but probably FAA, but somebody should step in and say, you are not getting money for fences or other purposes as long as money is drained off.

Mr. Gillilland. I suspect that is a function of FAA rather than ours but we will give it some attention.

Mr. Adams. I have a question.

Does your statement represent a feeling of all members of the CAB? Is this generally their position?

Mr. Gillilland. I am quite confident that is true. I know of nothing that is to the contrary.

[p. 58] Mr. Adams. You mentioned earlier in your statement that the Supreme Court must rule on a case-by-case basis. Isn't that true?

Mr. Gillilland. Yes.

Mr. Adams. In other words, they have said that Evansville and New Hampshire airports could each charge a dollar. But there is the Ohio case pending, whether or not these funds could be used for something other than airport development. Isn't that correct?

Mr. Gillilland. Well, this tax in Ohio was levied against the revenues of the air carriers allocable to the State and I believe those funds were earmarked to be used in the policemen's or firemen's pension fund or something of that kind. But they were not levied directly against the passengers.

Mr. Adams. CAB has economic regulation powers over all of the commercial airlines, does it not?

Mr. Gillilland. Yes.

Mr. Adams. And you said both tariffs and you also establish subsidies for some of the smaller carriers when they are unable to complete operations in some areas without a subsidy; isn't that correct?

Mr. Gillilland. That is true.

Mr. Adams. Won't the establishment of a head tax and the attendant cost of collecting change your whole regulatory system? Won't the CAB have to compensate for that in setting rates?

Mr. Gillilland. I would think that it would affect them; yes. It would be a complicated item.

Mr. Adams. Actually, if you have to have somebody there collecting these as they go along, I think you pointed out that each passenger cost the terminal the same, but that each passenger is just as expensive to process with a head tax. Is that not correct?

Mr. Gillilland. That is true.

Mr. Adams. So that, with a smaller carrier or particularly a local carrier that may be under subsidy with shorter routes, still having the same volume of passengers, their loss ratio or their expense revenue per dollar earned will substantially increase over that of the longer haul carriers, will it not?

Mr. Gillilland. Very much so.

Mr. Adams. And those are the areas that we presently have to allocate subsidies to, are they not?

Mr. Gillilland. That is true.

Mr. Adams. So, aren't we kind of involved with the Federal Government taking money out of one pocket and, in effect, giving it indirectly to the States or counties as they collect their head tax?

Mr. Gillilland. It certainly has that aspect, Mr. Adams.

Mr. Adams. I certainly appreciate your testimony, and perhaps a moratorium is the way. I think this is so bad and I, frankly, cannot, from reading the *Crandall* case, understand how, when the *Crandall* case said you couldn't collect a dollar per passenger for a railroad passenger, how you can collect a dollar per passenger for airport passengers.

The Supreme Court opinion says in that circumstance:

"At least until Congress chooses to enact a nationwide rule, the power will not be denied to the States," citing *Freeman v. Hewitt.*

Certainly this committee, in this member's opinion, has responsibility to act, whether we should put a moratorium on so you and other agencies and interested parties could examine and tell us what the [p. 59] impact will be on the Federal rate structure and on total aviation industry. Whether we should prohibit immediately seems to me to be a debatable point. But I think this committee should act.

I appreciate your coming this morning and testifying for the committee.

The committee will now stand adjourned until 2 o'clock this afternoon to continue with witnesses.

Thank all of you for coming, particularly you, Judge Gillilland.

The committee is recessed until 2 o'clock.

(Whereupon, at 12 noon, the subcommittee recessed, to reconvene at 2 p.m. of the same day.)

After Recess

(The subcommittee reconvened at 2 p.m., Hon. Brock Adams presiding.)

Mr. Adams. The subcommittee will come to order.

The next witness is Mr. Stuart G. Tipton, president of the Air Transport Association of America.

Mr. Tipton, we are pleased to have you here today. Introduce your colleagues for us, please.

STATEMENT OF STUART G. TIPTON, PRESIDENT, AIR TRANSPORT ASSOCIATION OF AMERICA; ACCOMPANIED BY JOHN DUBA, VICE PRESIDENT, AIR TRANSPORT FACILITIES; AND LEO SEYBOLD, VICE PRESIDENT, FEDERAL AFFAIRS

Mr. Tipton. Thank you, Mr. Chairman, and Mr. Harvey, for permitting us to come before the committee today. I am accompanied by, on my right, Mr. John Duba, vice president of the Air Transport Association in charge of air transport facilities. I rather think that the gentleman on my left does not require an introduction, but for the record he is Mr. Leo Seybold, vice president of Federal affairs of the association.

In response to the chairman's original suggestion, I would be pleased to put my full statement on these charts

into the record and proceed in summary form so as to cover the subject as closely as I can within 10 minutes.

Mr. Adams. Without objection, Mr. Tipton, your statement will appear in full following your summary, and if you wish to proceed now, the committee will be pleased.

Mr. Tipton. Thank you, Mr. Chairman.

The hearing brings us again to a discussion of airport financing on which this committee has spent so much time and on which such effective legislation has resulted.

The committee has established a uniform national plan for the development of the airports of the Nation, and has based that plan on assessment against users of the cost of that facility, and has established a trust fund in which the money is placed and from which it is taken.

In establishing that national level of taxation for the passengers, shippers, airlines, and general aviation, they have, through careful study of the system of taxation, provided for what we regard, and I think that passengers regard, as a fair and equitable method of dealing with the problem of financing airports.

[p. 60] In the process of the administration of this trust fund, I should point out that approximately $700 million was placed in the trust fund in fiscal year 1972, most of that from passengers, so the passenger is at this point paying very substantial sums for the development of airports.

Now, having established that national plan, we are faced here with two additional and basic problems. One of them arises in this fashion. Our airport needs have not been reduced in any respect. I think, if we look down the road, they seem to have increased somewhat from the figures we had before us at the time the committee considered this legislation in 1970 and 1971.

By the same token, by reason of the difficult financial position of both the cities and the airports, it appears that

we will have great difficulty in getting that money out of the trust fund for airport development purposes. The difficulty arises from the fact, of course, that the cities or the airlines or both must put up the necessary money, the necessary 50 percent of the total project, in order to get the other 50 percent out of the trust fund.

What we anticipate at the present time, and I will develop this in a little more detail in a moment, is that before very long we will find that we have very substantial airport needs that are unmet, that we have very substantial funds in the trust fund and we will not be able to get them out. The needs will be there, and our trust fund will be to a very substantial degree a savings account which cannot be drawn upon.

That is the statement of the first problem that I think we are asking the committee to give consideration to today, and we have recommendations for dealing with it.

The second problem arises out of the Supreme Court decision which was thoroughly discussed this morning and in which the Court said that head taxes could now be levied on the individual passenger by local communities.

I do want to emphasize, though, a point made by Vice Chairman Gillilland, and that is, while the Supreme Court said it was legal to do so, the Supreme Court did not say that it was wise. As a matter of fact, the Court pointed out in a sentence clearly addressed to the Congress that until Congress speaks in establishing the uniform system, the power to levy head taxes will not be denied to the States.

So the Court has pointed out that the Congress ultimately is the one who decides what the national policy shall be.

In order to present this picture as quickly as I can, and hopefully as clearly, I would ask the members of the committee to turn to the back of my testimony, where I have four charts.

Taking up first chart A . . .

. . . .

[p. 63] . . . .

Let me cover in just a few minutes the reasons why, in our opinion, the individual head tax as contemplated is a bad tax. I will cover it quickly, though it is, of course, of enormous importance to us.

The first reason: The Congress laid down a national plan which established equitable taxation to which no one objects, and it produces vast amounts of revenue. Every passenger, on the average, pays $4 for his ticket. That is a good, substantial tax, 8 percent of the value of his ticket, which averages out at about $4.

A national plan is particularly essential in view of the complexity and extensiveness of the air transport system to the United States. There is no system like it in the world. The U. S. airlines within the country transport more passengers, cheaper than any other system in the world. We should keep it that way.

Second: The imposition of individual head taxes immeasurably complicates the process of moving throughout this country over an airline, far more than one would expect by looking at the surface. We have nine of these taxes on the books, one of them in effect. We have the job usually of collecting them. We have worked for years to cut down the time involved in ticketing and handling a passenger in terminals because the passengers have demanded, in their use of air transportation, they don't want to fiddle around, they don't want to stand in line.

The imposition on that passenger of a dollar head tax doesn't seem like much trouble, but something has to be done to get the dollar: First, you have to assure yourself that the passenger owes it. He might be one of the exempted groups. Second, you have to give him something to show that he has paid it. Third, the airline has to keep something to show that it collected it. And fourth, it must subject itself to an audit of its activities, to be sure that it is doing its work right under the local ordinance.

It costs us—the study we had made a couple of years ago says it cost us $4 a piece for making a reservation and selling a ticket, each one $4. In going through the process of collecting the head tax and accounting for it, I would be greatly surprised if it would not add to our expense abo: $1.

We still have to give the city the dollar all right, because we normally don't get much of a rebate or a sales commission for these dollars, but I would like to bet, and I emphasize that I am estimating here, that if it costs us $4 to sell a ticket and make a reservation it will cost us at least a dollar to collect this dollar.

We know that we only have one of these in effect now, that is, Mobile. When it went into effect the other day, we found out what the passenger reaction was. They were mad. Of course, we don't like to have our passengers mad.

Philadelphia's goes into effect on the first of July. That will be a mess the like of which you have never seen, because we have to get them both coming and going. But getting them going is, heaven knows, hard enough in a big airport like that.

[p. 64] The third point against the head tax: it is decidedly inequitable. In the first place, you pay $1 for a $17 ticket and you pay $1 for a $500 ticket. It is all the same. For the short-haul carrier that is tough, because that increases his fare by a percentage that is very high.

Fourth, the tax, in our opinion, is self-defeating, as far as the community that charges it is concerned, because the communities that have been attracted to opportunities to charge the head tax have been communities that are suffering a deficit in the operation of their airport, and thus their action is to a degree understandable.

However, it is our belief that the airport is such a valuable part of that community's total economic operation, of the community's effort to grow and to become more economically self-sufficient, that the assessment of a head tax is self-defeating.

We have been making studies here recently of the economic impact of airports, and these studies have turned

out to be truly remarkable in the data that they have brought forward on the real value of an airport to a community. I will mention only two; I have records here at this point of 12:

In Atlanta, airline and airport related employment in Atlanta last year totaled 17,541, with a payroll of $289 million. Estimated economic impact of the airport on the area $363 million.

Denver employs over 7,000 people. They earn $95 million annually. Total direct impact of the airport on Denver comes to almost $150 million. The study also found that air travelers spent almost $65 million each year there.

It seems to us, therefore, when you consider just these two examples, that a city, even though it is running at a deficit, is getting tremendous value out of its airport. If it didn't have an airport, it would be a dead city economically, and there can be no question about it. And the testimony of the industrial concerns demanding before they will go to a city the existence of an airport, testifies to that also.

The final point on the head tax: the tax actually is uncontrollable so far as its application is concerned. The Supreme Court standards are vague. The only way to test whether a particular head tax is a legal head tax or not is to litigate it again to the Supreme Court. As soon as Philadelphia's goes into effect, back up we go.

And I see no end to this process of carrying one head tax after another to the Supreme Court in order to develop the law more clearly on that.

I think that that demonstrates the unwisdom, the real burdensome character of a head tax, and based on that, we would surely hope that this committee would adhere to its original decision and continue to insist upon a national system of taxation for airport improvement.

I do want to support and state briefly what I stated more extensively in our testimony: the need for a 100 percent Federal contribution for security equipment at airports. We believe that is thoroughly justified.

I need to make one brief comment on the position taken by the FAA and Department of Transportation. The position argued there is that what we should do is wait, we should wait and see what the cities and States do with this tax, and then if it looks like it isn't very good, presumably something would be done to unravel what had already been started.

[p. 65] I share Chairman Gillilland's position exactly that once this is established as a source of revenue, it cannot be stopped. I think now is the time to determine whether the passengers on the airlines of the United States will be plagued all over the country with individual head taxes or not, and I think we have data and experience up to this point which indicate that it would be a backward step in air transportation.

The comment was that it was contrary to the administration position in support of revenue sharing. I think that is quite wrong. The Airport Development Act recognizes that it was possible for the Federal Government to lay down a uniform tax throughout the country and laid in that tax with the full provision for giving the money back; in other words, to share the money with the local communities that were responsible for airports. The law we have now is a revenue sharing provision.

I think that I have covered the points, Mr. Chairman, and I would be glad to receive any questions.

(Mr. Tipton's prepared statement follows:)

Statement of Stuart G. Tipton, President, Air Transport Association of America

[The text of Mr. Tipton's prepared statement is omitted because his remarks are substantially similar to those reproduced above in the Senate Hearings].

118 CONG. REC. 22,598-99 (JUNE 27, 1972).

By Mr. CANNON (for himself and Mr. Magnuson):

S. 3755. A bill to amend the Airport and Airway Development Act of 1970 to increase the U. S. share of allowable project costs under such act; to amend the Federal Aviation Act of 1958 to prohibit certain State taxation of persons in air transportation and for other purposes. Referred to the Committee on Commerce.

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1972

Mr. CANNON. Mr. President, I am introducing a bill today to be known as the Airport Development Acceleration Act of 1972.

In the view of myself and the cosponsors, the bill represents our current thinking of how best to improve the landmark 1970 legislation known as the Airport and Airway Development Act. As my colleagues know, that act has been of immeasurable assistance in assisting local communities in meeting the ever increasing aviation needs required to support the U. S. air transportation system. The act provides for massive Federal assistance to local governments by providing nearly $300 million a year in Federal grants to local airport sponsors, which, in most cases, are counties and municipalities. Like most comprehensive programs the Airport and Airway Development Act, because of its size and scope, requires continued changes and updating to make certain that it continues to meet the needs for aviation development in the United States. This spring, the Subcommittee on Aviation, which I chair, held hearings on airport development problems and proposals to update the 1970 law to make it more responsive to local aviation needs.

The bill I am introducing today expresses my commitment to provide a better program to assist local communities in developing airport facilities.

Basically, Mr. President, the bill has seven provisions amending the Airport and Airway Development Act and one which amends the Federal Aviation Act of 1958.

Finally, [seventh] my bill prohibits State and local taxation on airline passengers or on the airlines themselves, but does not prohibit airport operators from levying and collecting other reasonable user charges such as landing fees, rental charges, and so forth. The provision will prohibit a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million air travelers in this country. The legislation would prohibit the levying of State or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The bill is in response to a situation which has been brought about by a recent Supreme Court decision upholding passenger head taxes enacted by New Hampshire and by Evansville, Ind., for "aviation-related purposes." While this decision has invited State and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

In the wake of this decision, a rash of proposals varying widely in rate, scope and applicability, has broken out throughout the Nation. It is significant that revenues from some of these head taxes would not be used to provide funds for airport construction or operation, but would be used to nourish general fund coffers. For example, Philadelphia has levied a tax of $2 per passenger on passengers both arriving in and departing from that city.

The revenues will accrue to the city's general fund not the Philadelphia airport. Other cities as well have leveled their sights at air travelers who are convenient, vulnerable and captive targets. Certainly we can anticipate the proliferation of such action.

Mr. President, Congress must act to protect the American air travel consumer from such discriminatory taxation, in observance of an old axiom that "In levying taxes and in shearing sheep, it is well to stop when you get down to the skin." The Nation's air travelers are already being heavily taxed to pay for airport facilities and airways modernization. As a result of the 1970 act

every passenger in air transportation pays an 8-percent excise tax on the price of his ticket to support these developments. Total user tax revenues will reach about $693 million this year. Since this tax money is earmarked for airport and airway improvements, there is no need to add an additional burden of taxation on these travelers or on the carriers and in fact, it would be a breach of faith for Congress to stand idly by while this is done by other units of government.

Mr. President, at the present time the average value of a round trip airline ticket in the United States is about $85. Therefore, the average traveler today pays a Federal tax of $6.80, the revenues from which are reserved for aviation facilities development. In 1970, while the Committee on Commerce and the Committee on Finance were considering this legislation, it was our firm intent that the Federal excise tax be the only tax on passengers in air transportation. While the Supreme Court has said that Congress did not preempt this field in 1970, it was certainly our intention, in my opinion, to do so. At that time several States and local government had attempted to levy head taxes on passengers in air transportation and it was widely assumed because of lower court decisions and qualified legal opinion that such taxes were unconstitutional as an undue burden on interstate commerce.

Despite the views we heard in 1969 and 1970 and despite the fact that the Federal Government presently taxes passengers at the rate of 8-percent on airline tickets, the High Court has opened the door wide to multiple passenger taxation.

Something must be done, and it is fitting that the Nation's air travelers look to us for decisive action. In its decision, the Supreme Court seemed to invite congressional action for the Court pointed out that—

At least until Congress chooses to enact a nationwide rule, the power will not be denied to the States.

The legislation introduced today, provides the vehicle for Congress to make it clear that it will not allow indis-

criminate levying of burdensome head taxes on citizens traveling in interstate commerce. Nor will we allow the growth of our national air transportation system to be impeded by abandoning it to the chaos of discriminatory taxation on air travelers.

Mr. President, this bill will be considered by the Commerce Committee in executive session shortly and hopefully favorably reported.

I hope that it will have the enthusiastic support of all the members of the Senate as it provides great new sources of Federal assistance and cooperation in assisting local communities in meeting the aviation needs of the future.

SENATE

92d Congress
2d Session

Report
No. 92-1005

AMENDING THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970

August 1, 1972.—Ordered to be printed

Mr. Cannon, from the Committee on Commerce, submitted the following

REPORT

[To accompany S. 3755]

The Committee on Commerce, to which was referred the bill (S. 3755) to amend the Airport and Airway Development Act of 1970 to increase the United States share of allowable projects costs under such Act; to amend the Federal Aviation Act of 1958 to prohibit certain state taxation of persons in air transportation, and for other purposes having considered the same, reports favorably thereon with amendment(s) and recommends that the bill (as amended) do pass.

The bill, with amendments, is printed below.

The amendments are indicated as follows: Omit the part in brackets and insert the part printed in italic.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Airport Development Acceleration Act of 1972".

. . . .

[p. 4] . . . .

Sec. 7. (a) Title XI of the Federal Aviation Act of 1958 is amended by adding at the end thereof the following new section:

["State Taxation

"Sec. 1113. No State (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly on persons traveling in air transportation or the carriage of persons' air transportation, or on the gross receipts derived therefrom. Provided, however, that nothing herein shall prohibit a State (or any political subdivision thereof) from the levy or collection of taxes other than those enumerated above, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services (other than on the sale of interstate air transportation or any portion thereof); and further provided, that nothing herein shall prohibit a State (or political subdivision thereof) owning or operating an airport from the levy or collection of reasonable rental charges, landing fees, and other service charges for the use of airport facilities (measured on other than a per-passenger basis)."]

"State Taxation of Air Commerce

"Sec. 1113(a). No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Island, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more states) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

"(b) Nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more states) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services and nothing herein shall

prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Is- [p. 5] *lands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more states) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."*

(b) That portion of the table of contents contained in the first section of such Act which appears under the center heading "TITLE XI—MISCELLANEOUS" is amended by adding at the end thereof the following: ["Sec. 1113. State taxation."] *"Sec. 1113. State taxation of air commerce."*.

Amend the title so as to read: "A bill to amend the Airport and Airway Development Act of 1970, as amended, to increase the United States share of allowable project costs under such act; to amend the Federal Aviation Act of 1958, as amended, to prohibit certain state taxation of persons in air commerce, and for other purposes."

Purpose of the Bill

S. 3755 amends the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958 so as to increase Federal financial assistance for airport development throughout the United States. It also prohibits the levying, by State and local governments, of passenger "head" taxes or use taxes on the carriage of persons in air transportation.

The legislation to provide increased Federal participation in airport development grants is required because of the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the nation's system of publicly owned airports. The funds required to increase the Federal share of airport development grants will come from the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970. The fund is funded from revenues from user taxes on aviation sys-

tem users and contains and will contain adequate revenues to cover the cost of the increased Federal assistance. No new taxation or no expenditure of general U. S. funds will be required as a result of the legislation.

The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

Provisions of the Bill

. . . .

[p. 7] . . . .

Section 7 of the bill adds a new Section 1113 to the Federal Aviation Act of 1958 prohibiting any tax, fee, head charge or other charge directly or indirectly, on persons traveling in air transportation or on the carriage of persons in air transportation or on the gross receipts derived therefrom. The bill allows, however, for the continuation of the levy and collection of other reasonable rental charges, landing fees and other service charges for the use of airport facilities.

Finally, Section 7(b) of the bill amends the table of contents of the Federal Aviation Act to bring it into conformity with the addition of the new Section 1113.

HOUSE OF REPRESENTATIVES

92d Congress
2d Session

Report
No. 92-1279

AIR PASSENGER FEES—STATE AND LOCAL CHARGES

August 2, 1972.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Staggers, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H.R. 14847]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 14847) to amend the Airport and Airway Development Act of 1970 to increase from 50 to 75 per centum the U. S. share of allowable project costs payable under such act; to amend the Federal Aviation Act of 1958 to prohibit State taxation of the carriage of persons in air transportation; and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following: That, during the eighteen-month period beginning on the date of enactment of this Act, no State (or any political subdivision thereof) shall levy or collect any tax, fee, or other charge, directly or indirectly, on persons traveling in interstate, overseas, or foreign air transportation or on the carriage of persons in interstate, overseas, or foreign air transportation.

Sec. 2. (a) The Civil Aeronautics Board shall conduct a full and complete investigation of taxes, fees, and other charges levied and collected by States and their

political subdivisions, directly or indirectly, on persons traveling in interstate, overseas, or foreign air transportation or on the carriage of persons in interstate, overseas, or foreign air transportation in order to determine the effect of such taxes, fees, or other charges on air transportation in the United States. Not later than twelve months after the date of enactment of this Act, the Board shall report to the President and to the Congress the results of such investigation, together with such recommendations as it may deem appropriate.

(b) The Civil Aeronautics Board may secure directly from any department or agency of the United States information necessary to enable it to carry out this section. Upon request of the Board, the head of such department or agency shall furnish the information so requested.

(c) In the conduct of the investigation required by this section, the Civil Aeronautics Board may hold hearings, issue subpoenas, administer oaths, examine witnesses, and receive evidence in the same manner as provided by section 1004 of the Federal Aviation Act of 1958 (49 U. S. C. 1484).

Sec. 3. As used in this Act—

(1) the term "State" means a State of the United States, the Commonwealth of Puerto Rico, the District of Columbia, the Virgin Islands, and Guam; and

[p. 2] (2) the terms "interstate air transportation", "overseas air transportation", and "foreign air transportation" shall have the same meaning given such terms by section 101(21) of the Federal Aviation Act of 1958 (49 U. S. C. 1301(21)).

Sec. 4. There are authorized to be appropriated such sums, not to exceed $100,000, as may be necessary to enable the Civil Aeronautics Board to carry out the provisions of section 2 of this Act.

Sec. 5. The first sentence of Section 12(a) of the Airport and Airway Development Act of 1970 (49 U. S. C.

1712(a)) as amended by striking out "two years" and inserting in lieu thereof "three years".

Amend the title so as to read: "A bill to provide for a moratorium on State taxation of the carriage of persons in air transportation, and for other purposes.".

Purpose

The purpose of this legislation is to authorize the Civil Aeronautics Board to conduct a 1-year study to determine the financial needs at airports which are funded in whole or in part at a State or local level. The Civil Aeronautics Board is to report to the President and to the Congress the results of its investigation with appropriate recommendations as to how the financial needs at airports may best be met. In order to allow time for the Civil Aeronautics Board's investigation and report and for congressional review of the Board's action, the legislation provides for an 18-month moratorium barring States, or subdivisions thereof, from levying or collecting any charges on persons traveling in air transportation.

Hearings

On June 19 and 23, 1972, the Subcommittee on Transportation and Aeronautics held hearings on H.R. 2337, H. R. 10326, H. R. 10470, H. R. 10864, H. R. 14847, and H. R. 14991. The hearings revolved around the question of State and local taxation and the Federal share of funds to be used for airport construction, maintenance, and improvements. Interest in the hearings was augmented by recent United States Supreme Court cases upholding the constitutionality of enplaning charges on passengers using scheduled aircraft. (***Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc., et al.; Northeast Airlines, Inc., et al. v. New Hampshire Aeronautics Commission et al.*** April 19, 1972). For complete text of Supreme Court decision, see page 2 of hearings, Serial No. 92-74. Witnesses representing virtually all segments of air transportation appeared. Their presentations ranged from recommendations against any legislation to recommendations

of a permanent prohibition against State and local charges on air passengers.

Committee Action

On June 27, 1972, the Subcommittee on Transportation and Aeronautics considered the several legislative proposals included in the [p. 3] hearing record and determined to report H.R. 14847 with an amendment to limit the bill to an 18-month moratorium barring the levying or collecting of State or local charges on passengers in air transportation. The subcommittee action was unanimous.

On July 26, 1972, the Committee on Interstate and Foreign Commerce considered H.R. 14847 and reported favorably by voice vote with two amendments. The first amendment eliminated a "grandfather clause" which would have allowed States or subdivisions thereof to continue levying and collecting taxes on persons in air transportation if they were so doing before June 1, 1972. The second amendment allowed the Secretary of Transportation an additional year to publish a national airport system plan.

Background and Need

Prior to 1970, Federal participation in airport construction, maintenance, and development was severely limited by budgetary restrictions. All Federal monies had to be appropriated from general funds. In 1970 under the Airport and Airway Development Act, Public Law 91-258, an aviation trust fund was established. The primary money resources for the fund flows from an 8 percent excise tax on domestic tickets. This produces over $600 million a year and an additional $150 million a year is derived from air freight, fuel, and aircraft taxes and $3 tax on passengers destined for foreign countries. The trust fund promises a continuing, long-term, substantial, supportive role by the Federal Government. Before the trust fund was created, the Federal Aviation Administration and its predecessor had to turn down or postpone local and State programs even where the local or State funding was provided for because the Federal share was not available.

Now, at least in some situations, the reverse is true. The Federal resources are available or are expected to be available, but many States and subdivisions of States are having difficulty raising the money required for matching Federal grants. To meet its needs the airport authority in Evansville, Ind., established "a use and service charge" of $1 for each enplaning passenger leaving Dress Memorial Airport. Similarly, the State of New Hampshire passed a law requiring all interstate and intrastate "common carriers of passengers by hired aircraft on a regular schedule" using New Hampshire's five publicly owned airports to pay a service charge of $1 for each passenger enplaning (for aircraft of 12,500 pounds or less, the New Hampshire charge is 50 cents per passenger). On April 19, 1972, both the Indiana charges and the New Hampshire charges were upheld by the U. S. Supreme Court.

This form of raising money for airports was not considered in the congressional action which led to the Airport and Airway Development Act. Subsequent to the Supreme Court's decision to remove the barriers to this type of taxation, the following State or local authorities have imposed similar charges:

[p. 4] [Table listing seventeen jurisdictions with head taxes is omitted.]

. . . .

A number of other jurisdictions are giving consideration to legislation to establish similar charges. As indicated earlier, the record before the committee varies from a flat permanent prohibition against charges assessed against the passengers and various recommendations with respect to increasing the Federal participation for aid to airports to the course which the committee chose, a temporary moratorium. Under the bill as reported by the committee, the responsibility for determining, identifying and measuring airport needs throughout the country is placed in the Civil Aeronautics Board. The investigation which the Board is expected to conduct should be broad in its scope. The committee does not expect the Board to limit its investigation and subsequent report and recommendations to the newly validated passenger charges.

Rather, the Board is expected to consider these new charges and any other procedures for generating monies to support airports. This will, of course, include possible changes in the Federal share of airport funding. However, a distinction must be made between the broad scale of the Board's investigation and the narrow scope of the moratorium. The moratorium is aimed strictly at the type of passenger charges under consideration in the recent U. S. Supreme Court cases discussed herein. The moratorium applies to the entire United States but affects only those charges under consideration by the Supreme Court and the similar charges enacted, levied, and collected after the Court's decisions.

Cost

Pursuant to rule 13, clause 7 of the Rules of the House of Representatives and in order to carry out the investigation contemplated in the legislation, the committee authorized to be appropriated sums not to exceed $100,000.

Summary of the Committee: Amendment

Moratorium On Air Passenger Fees

The first section prohibits any State or political subdivision from levying or collecting any charge on persons traveling in interstate, [p. 5] overseas, or foreign air transportation for a period of 18 months, beginning with the enactment of this Legislation.

Investigation of Air Passenger Fees

Section 2(a) requires the Civil Aeronautics Board (CAB) to conduct a complete investigation of State and local charges levied and collected on persons traveling in air transportation and to report the results of such investigation to the President and to the Congress within 12 months after the enactment of this legislation, together with any recommendations it deems appropriate.

Section 2(b) authorizes the CAB to obtain information from other Federal agencies to carry out the required investigation and requires such agencies to furnish the information so requested.

Section 2(c) provides that the CAB may, in conducting the required investigation, hold hearings, issue subpenas, and receive evidence in the same manner as in the case of Board proceedings governed by section 1004 of the Federal Aviation Act of 1958. (See appendix.)

118 CONG. REC. 27,812-29 (AUG. 10, 1972).

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1972

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 954, S. 3755.

The PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

Calendar No. 954 (S. 3755) a bill to amend the Airport and Airway Development Act of 1970 to increase the United States share of allowable project costs under such act; to amend the Federal Aviation Act of 1958 to prohibit certain State taxation of persons in air transportation, and for other purposes.

The PRESIDING OFFICER. Is there objection to the request of the Senator from West Virginia? The Chair hears none, and it is so ordered.

The Senate proceeded to consider the bill which had been reported from the committee with amendments . . .

. . . .

On page 8, after line 7, strike out:

"State Taxation

"Sec. 1113. No State (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or the carriage of persons in air transportation, or on the gross receipts derived therefrom, provided however, that nothing herein shall prohibit a State (or any political subdivision thereof) from the levy or collection of taxes other than those enumerated above, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services (other than on the sale of interstate air transportation or any portion thereof); and further provided, that nothing herein shall prohibit a State (or political subdivision thereof) owning

or operating an airport from the levy or collection of reasonable rental charges, landing fees and other service (measured on other than a per passenger basis)."

And, in lieu thereof, insert:

"State Taxation of Air Commerce

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

"(b) Nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing herein shal[1] prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

And, on page 10, after line 6, strike out:

"Sec. 1113. State taxation.".

And, in lieu thereof, insert:

"Sec. 1113. State taxation of air commerce."

Mr. CANNON. Mr. President, I am happy to bring before the Senate, S. 3755, the Airport Development Acceleration Act of 1972.

This bill provides a great new source of funds for airport development and improvement throughout the United States. The bill will reduce substantially the reliance on locally generated funds for airport development and will place a greater burden and responsibility on the United States to encourage, promote, and finance aviation facilities which are required in the National Air Transportation System.

The bill provides that the cost of this increased Federal participation will be borne by the users of the system, not the general taxpayer. The airlines, airline passengers and shippers and aircraft owners and operators all contribute to the development of the system by paying user taxes established in 1970. During the current fiscal year those taxes will bring in revenue of more than $750 million—S. 3755 provides that a greater share of the revenues from these taxes will filter down to local governments—airport sponsors—to meet local and national needs.

In accepting a greater Federal role and responsibility in airport development, the committee has also acted to prohibit local head taxation on passengers or on the carriage of passengers. We believe such taxation to be inimical to the development of a national system funded in large part by uniform Federal taxes. Currently some disagreement exists within the administration as to whether the committee action increasing Federal participation in airport development is warranted at this time. The committee however is convinced that it is.

Nonetheless, the committee views S. 3755 as an aviation development package—the components of which cannot be separated. We believe that if the prohibition on local head taxes was not a part of the total new program, there would be need to reevaluate the increased Federal funding for airport development projects called for in S. 3755. If local taxes on passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program.

If local taxes become a significant airport funding mechanism the public interest may well require a reduction in Federal user taxes and a diminution of Federal participation in airport development projects.

Therefore, by prohibiting State taxation on passengers or on air transportation, the committee has accepted greater responsibility for U. S. assistance believing that the two actions must be viewed together and that neither should stand alone without the other.

S. 3755 amends the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958 so as to increase Federal financial assistance for airport development throughout the United States. It also prohibits the levying, by State and local governments, of passenger "head" taxes or use taxes on the carriage of persons in air transportation.

The legislation to provide increased Federal participation in airport development grants is required because of the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the Nation's system of publicly owned airports. The funds required to increase the Federal share of airport development grants will come from the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970. No new taxation or no expenditures of general U. S. funds will be required as a result of the legislation.

The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

. . . .

Section 7 of the bill adds a new section 1113 to the Federal Aviation Act of 1958 prohibiting any tax, fee, head

charge or other charge directly or indirectly, on persons traveling in air transportation or on the carriage of persons in air transportation or on the gross receipts derived therefrom. The bill allows, however, for the continuation of the levy and collection of other reasonable rental charges, landing fees, and other service charges for the use of airport facilities.

Summing up, quickly:

First. S. 3755 increased Federal grant in aid payments from 50 percent to 75 percent on airport airfield development projects at all but the 65 largest airports in the United States.

Second. Terminal area development related to the movement of passengers and their baggage through the airport will be eligible for 50 percent Federal funding. Currently, such development is not eligible for Federal assistance.

Third. Development required as a result of airport certification regulations or airport security regulations will be eligible for grant-in-aid assistance of 82-percent Federal participation. Currently, Federal participation for this type of project is limited to 50 percent.

Fourth. Total amounts available for airport development grants each year is increased from $280 to $420 million—an increase of $140 million per year to be financed entirely by user taxes.

Fifth. And, finally, S. 3755 provides a prohibition against levying or collecting State and local government passenger head taxes or taxes on the sale of air transportation.

Mr. President, the passage of this bill will have a significant impact on the financing of local government affairs. At nearly all of the Nation's almost 3,000 publicly owned and operated airports, the U. S. Government will assume 75 percent of the responsibility for development of new and improved airfield facilities. And this increased Federal support will not come from general tax dollars; it

will come from taxes on the users of the air transportation system.

The passage of this legislation will enable local government bodies, particularly smaller towns, counties, and communities to more easily fund other vital community programs such as schools, roads, sewers, police protection, and other services with money which might have been required for aviation facilities development. With greater Federal assistance to meet airport needs, scarce local funds will be available for other uses.

Mr. President, the Airport and Airway Development Act of 1970 was landmark legislation—for the first time it provided local governments a vast new source of funds to develop new and improved airports. At the same time it created a well-funded program to upgrade, modernize, and expand our air navigation facilities throughout the United States so as to improve the safety and efficiency of of the system. Mr. President, the act today is working well. With the changes proposed in S. 3755, the program will become even more responsive to the needs of the national system and to the needs of local governments who are partners with the Federal Government in developing a truly national and uniform air transportation system.

. . . .

Mr. PEARSON. Mr. President, I am pleased that the Airport Development Acceleration Act is before the Senate for debate today. This legislation contains urgently needed amendments to the Airport and Airways Development Act of 1970. (*Id.* at 27,815).

. . . .

Finally, Mr. President, the committee bill prohibits State and local taxation of air fares. The Commerce Committee and the Congress intended in 1970 to preempt the States and localities from levying such taxes, as taxation on air fares is one of the predominant sources of revenue for the trust fund. Recent Supreme Court decisions necessitate the clarification of this congressional policy determination.

If more than 500 localities—or even a significant proportion of this number—were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce. The national system of air service upon which tens of millions of Americans depend each year would become a hodgepodge of Balkanized assessments and levies against nonresident travelers whose business or leisure takes them across State lines. The committee bill prohibits State and local taxation of air fares, but this Federal preemption is carefully balanced by substantial increases in trust fund assistance for airport development and modernization. (*Id.* at 27,816).

. . . .

Mr. HUGHES. I do not want to agree to considering the amendment until we know what it is.

The PRESIDING OFFICER. The Chair will ask that the amendment be stated.

The amendment was read as follows:

On page 9, line 10, strike the period, insert a colon and the following:

"*Provided however,* That any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973."

The PRESIDING OFFICER. Is there objection to the Senator from New Hampshire offering his amendment and for the amendment to be considered? The Chair hears no objection, and it is so ordered.

The Senator from New Hampshire is recognized.

Mr. COTTON. I yield myself 3 minutes.

Mr. President, one of the purposes of the bill is to put an end to assessing "head fees" on passengers by airports. It does not preclude—and the distinguished chairman of the subcommittee (Mr. Cannon) will correct me if I am wrong—charges against aircraft operators for the use of airports, but not based on the number of passengers.

Mr. CANNON. Mr. President, if the Senator will yield, the Senator is correct. It does not do away with landing fees, charges for space rental in terminal buildings, things of that sort.

Mr. COTTON. I want to express my appreciation to the distinguished Senator from Nevada (Mr. Cannon) for agreeing to accept my amendment. In this particular case a special hardship would have occurred in the State of New Hampshire.

The State of New Hampshire has had a law charging air carriers a fee based upon the number of passengers enplaned long before enactment of the Airport and Airway Development Act on May 21, 1970. The New Hampshire law was first enacted in October 1959, and it was revised in August 1969 (chapter 391 of 1969 Laws of New Hampshire, amending N. H. Rev. Stat. Ann. sections 422:3, 43, 45). It has been sustained as constitutional by the New Hampshire Supreme Court and the Supreme Court of the United States.

My amendment unfortunately will not exempt New Hampshire indefinitely from this bill's prohibition on the head charge. It will do so only until July 1, 1973.

Now, New Hampshire happens to be in the unique situation where the fate of its air service depends entirely on the Civil Aeronautics Board's decisions as to whether it is going to require certificated air carrier service to our northern area which comprises about three-fourths of the entire State.

Presently, some of our airports either have no service or such minimal service that they have no income, and would have to close down now, or very shortly, if this bill passed without my amendment providing a grace period for the State of New Hampshire with respect to prohibiting its tax. My amendment simply provides a reprieve since after July 1, 1973, New Hampshire, too, will be prohibited from levying this particular charge, as are other States.

I am very grateful to the Senator from Nevada (Mr. Cannon) for agreeing to my amendment, which was a compromise since I wanted more for the people of my State.

Mr. President, I ask unanimous consent to add the name of my distinguished colleague from New Hampshire (Mr. McIntyre) as a cosponsor of the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CANNON. Mr. President, I yield myself 1 minute.

I just want to say that I commend the distinguished Senator from New Hampshire for his diligent efforts in providing for the airports in his State and for trying to keep them in business. They have a very difficult time because of the lack of service or because of inadequate service provided to that area. He has long complained about and attempted to do something about it. This amendment will serve them until next year to come into compliance with the act. The amendment applies only to the State of New Hampshire; it is the only State that had a head tax being levied and collected at the time of the adoption of the Airport and Airway Development Act.

So I am happy to accept the amendment of the distinguished Senators from New Hampshire, and, hopefully, it will be adopted by this body. (*Id.* at 27,817).

. . . .

Mr. CHILES. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

On page 10, between lines 2 and 3, insert the following: "(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

"(2) is collecting, without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until such authority has repaid such loan or loans, if the entire amount of such tax collected is applied to such repayment."

Mr. CHILES. Mr. President, I yield myself 4 minutes to discuss the amendment.

This amendment is very narrowly drawn to reflect a particular situation we have in the State of Florida, in that we have the Bradenton-Sarasota Airport, which had previously been collecting a head tax itself, not imposed by any air carrier, and had used that head tax to build permanent facilities, and had bonded that head tax to pay for those facilities.

This particular airport has no other taxing authority; it has no real property taxing authority, and the only source of money it has to repay the cost of those facilities is the head tax itself.

It is a $1 head tax, which the airport itself collects. This amendment would simply provide that they would not come under the provisions of the act until they had had an opportunity to pay off the $350,000 that they have borrowed, using this head tax to pay that off, and at that

time they would come under that provision, like the rest of the provisions.

I think they are clearly an exception. They are not like the Philadelphia case; they are not making the airlines collect it; they were charging it at a time when the courts said it was legal to so charge; and it is the only source of revenue this particular airport had to improve its facilities.

It has now improved its facilities. If we wipe out that head tax on that airport now, we would just throw them into bankruptcy, and I do not know what they would do about the collection of the bonds themselves, because they did obligate themselves to be able to pay for those facilities on the basis of the tax itself.

I am sure it would not run too long a period of time for them to be able to pay off the bonds, and I hope that the sponsors of the bill will see that this would be a narrow exception to the provisions of the bill, and will be willing to accept the amendment.

I reserve the remainder of my time.

Mr. CANNON. Mr. President, I yield myself 1 minute.

I am sympathetic to the Senator's problem, but if we are going to, on a case-by-case basis, permit airports around the country to impose a head tax, we had just as well not write any legislation on it at all.

We have taken some very strong steps here to help every airport in the country by making more Federal money available and by making money available for more purposes. Every airport in the country can benefit by this bill. Yet some of them apparently still want to collect the head tax. (*Id.* at 27, 818).

. . . .

We are trying to enact a nationwide rule. If we are going to exempt Sarasota, Fla., I am not sure that it

could be said that this is a nationwide rule, and we might run into a serious constitutional question. (*Id.* at 27, 819).

. . . .

Mr. COTTON. Mr. President, I yield myself 1 minute on the bill. Would the Senator from Florida (Mr. Chiles) be satisfied if an amendment could be agreed to which would give his airport time to make some of the arrangements the Senator from Nevada (Mr. Cannon) has suggested? For example, an amendment to continue the present fees until July 1 of next year, by which time the airport would have to find some other way to satisfy the obligation. I have no authority to agree to it myself, but I should like to know if he would feel that would be fair play?

Mr. CHILES. I would accept that. (*Id.*).

. . . .

The PRESIDING OFFICER. All time on this amendment has now been yielded back.

The question on agreeing to the amendment, as modified, of the Senator from Florida (Mr. Chiles).

The amendment was agreed to. (*Id.* at 27, 820).

. . . .

Mr. CANNON. Mr. President, it seems to me we are missing the basic point, which is that we are trying to get the airports out of the business of placing taxes on passengers. If we do not do something about that, we are going to have the biggest number of the maddest passengers we have ever seen in this country. (*Id.* at 27,825).

. . . .

MR. HARTKE . . . .

. . . .

Mr. President, this bill is before us today because of a law suit which involved the Evansville-Vanderburgh airport. That airport handles more than 329,000 passengers

each year. It serves not only Vanderburgh County, but 40 other counties in the surrounding area. To ask the residents of Vanderburgh County to bear through property tax the burden of operating a rapidly expanding airport which serves 40 other counties is to place an unfair and unjust burden on property owners in Vanderburgh County.

I oppose this legislative effort to overturn a decision of the U. S. Supreme Court. . . . (*Id.* at 27,826).

. . . .

So the bill (S. 3755) was passed, as follows:

. . . .

"State Taxation of Air Commerce

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom:

Provided, however, That any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied and collected a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

"(b) Nothing herein shall prohibit a State (the political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States

or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

"(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

"(2) is collecting, without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans.

the provisions of subsection (a) shall not apply to such authority until July 1, 1973." (*Id.* at 27-829).

. . . .

118 CONG. REC. 29,152-56 (AUG. 18, 1972).

AIR PASSENGER FEES—STATE AND LOCAL CHARGES

Mr. STAGGERS. Mr. Speaker, I ask unanimous consent that the bill (H.R. 14847) to amend the Airport and Airway Development Act of 1970 to increase from 50 to 75 percent the U. S. share of allowable project costs payable under such act; to amend the Federal Aviation Act of 1958 to prohibit State taxation of the carriage of persons in air transportation; and for other purposes, be considered in the House as in the Committee of the Whole House on the State of the Union.

. . . .

The Clerk read the bill, as follows:

. . . .

"Sec. 1113. No State (or any political subdivision thereof) shall levy or collect a tax, fee, or other charge, directly or indirectly, on persons traveling in air transportation or the carriage of persons in air transportation by any aircraft—

"(1) Operated by an air carrier certificated by an agency of the United States to perform air transportation,

"(2) operated by any person subject to regulation by an agency of the United States in the performance of air transportation, or

"(3) operating to or from any airport financed, in whole or in part, from Federal funds.".

. . . .

Mr. STAGGERS. Mr. Speaker, I move to strike the last word.

Mr. Speaker, the purpose of H.R. 14847 is to authorize the Civil Aeronautics Board to conduct a 1-year investigation as to the ramifications of air passenger fees exacted by State and local agencies. The CAB will determine the financial needs at the airports throughout the

country and make recommendations to the President and to the Congress as to the manner in which such needs should be met. To allow time for the CAB investigation, report, and recommendations and time for congressional review of the Board's action, the bill provides for an 18-month moratorium barring States and subdivisions of States from levying or collecting any per capita charges on air travelers.

The need for this legislation was brought to the fore by recent Supreme Court cases concerning air passenger charges enacted in New Hampshire and in Indiana. The cases were decided on April 19 of this year. There are now some 17 jurisdictions which have enacted per capita or enplaning charges on air passengers. They are listed on page 4 of the committee report. All except the Indiana and New Hampshire charges have been enacted since the Supreme Court decisions in April. The Committee on Interstate and Foreign Commerce feels very strongly that the moratorium is warranted so that these new charges can be evaluated both as to the merit of such charges and as to the need for insuring uniformity in fundraising for the support of airport construction, maintenance, and development.

. . . .

Mr. MATSUNAGA. Mr. Speaker, will the gentleman yield?

Mr. STAGGERS. I yield to the gentleman from Hawaii.

Mr. MATSUNAGA. I thank the distinguished chairman of the Committee on Interstate and Foreign Commerce for yielding.

For the purpose of establishing legislative history, and for clarifying the language which is used on page 3, beginning with line 13, I wish to ask the gentleman whether the word in line 16 "indirectly" is intended to cover user fees imposed on the basis of tonnage, as some airports do, as in the case of Hawaii.

Mr. STAGGERS. I would answer the gentleman in the negative, positively it does not affect that.

Mr. MATSUNAGA. Even though the tonnage may be based on the weight which may be increased by the number of passengers onboard?

Mr. STAGGERS. Not in any way. It was not intended to do this, and it specifically goes to "head tax" charges.

Mr. MATSUNAGA. I thank the gentleman from West Virginia for making it clear, because I am fearful that the word is rather broad and may be misinterpreted by those who are charged with enforcement of the act.

. . . .

Mr. GROSS. Mr. Speaker, is this to be considered as the Senate version on this subject or the House version?

Mr. STAGGERS. The House version.

Mr. GROSS. Certainly it is not the same as the original House bill.

Mr. STAGGERS. No. We explain it in the latter part of the bill that changes are made, setting forth and amending the title so as to read: A bill to provide for a moratorium on State taxation of the carriage of persons in air transportation, and for other purposes.

. . . .

Mr. BROYHILL of North Carolina. Mr. Speaker, I move to strike the last word.

Mr. Speaker, the situation is that a number of cities and towns around the country have been imposing these head taxes on passenger and it is growing by leaps and bounds. I am sure Members have been hearing from their airport authorities and the managers around the country.

What the committee is concerned about are two things.

First. It is going to result if it continues in a real hodgepodge. We do not know what the administrative burden would be of trying to collect on these taxes. They are certainly not uniform.

Second. Another thing we are concerned about is that the purpose, they say, of collecting these head taxes is so they can build capital improvements at their local airports, but we have evidence to show that these funds may not necessarily be spent for this purpose. They may be used to defray some of their present ongoing administrative costs. So the committee felt a moratorium was necessary at this time in order to give us a chance to come up with a sound long-range program.

No one denies the fact that the local communities which operate these airports certainly need funds to build the needed capital improvements and facilities.

If we are going to do this, I believe we should have a sound, long-range plan which is workable and which does not impose an undue administrative burden.

For this reason the committee has recommended to the House a moratorium and a study. This is not a complete prohibition. All it does is to put a moratorium on for 18 months for the collection and levying of these so-called head taxes. Hopefully by then we can come up with sound recommendations.

. . . .

Mr. STAGGERS. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. Staggers moves to strike out all after the enacting clause of S. 3755 and to insert in lieu thereof the provisions of H. R. 14847, as passed.

The motion was agreed to.

The Senate bill was ordered to be read a third time, was read the third time, and passed.

The title was amended so as to read:

The title was amended so as to read: "A bill to provide for a moratorium on State taxation of the carriage of persons in air transportation, and for other purposes."

A motion to reconsider was laid on the table.

A similar House bill (H.R. 14847) was laid on the table.

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118 CONG. REC. 30,116-17 (SEPT. 11, 1972).

AMENDMENT OF AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970

Mr. CANNON. Madam President, I ask the Chair to lay before the Senate a message from the House of Representatives on S. 3755.

The PRESIDING OFFICER (Mrs. Edwards) laid before the Senate the amendments of the House of Representatives to amend the Airport and Airway Development Act of 1970, as amended, to increase the United States share of allowable project costs under such Act; to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes, which were to strike out all after the enacting clause, and insert: [the House amendments requiring a head tax moratorium].

. . . .

And amend the title so as to read: "An act to provide for a moratorium on State taxation of the carriage of persons in air transportation, and for other purposes."

Mr. CANNON. Madam President, I ask that the Senate disagree to the House amendments and request a conference with the House of Representatives on the disagreeing votes of the two Houses thereon, and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed Mr. Magnuson, Mr. Cannon, Mr. Hart, Mr. Cotton, and Mr. Pearson conferees on the part of the Senate.

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118 CONG. REC. 30,511 (SEPT. 13, 1972).

APPOINTMENT OF CONFEREES ON S. 3755, AMENDING AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970 AND FEDERAL AVIATION ACT OF 1958

Mr. STAGGERS. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (S. 3755) to amend the Airport and Airway Development Act of 1970, as amended, to increase the U. S. share of allowable project costs under such act; to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes, with House amendments thereto, insist on the House amendments, and agree to the conference asked by the Senate.

The SPEAKER. Is there objection to the request of the gentleman from West Virginia? The Chair hears none, and appoints the following conferees: Messrs. Staggers, Jarman, Dingell, Harvey, and Kuykendall.

HOUSE OF REPRESENTATIVES

92d Congress
2d Session

Report
No. 92-1543

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1972

October 5, 1972.—Ordered to be printed

Mr. Staggers, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 3755]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 3755) to amend the Airport and Airway Development Act of 1970, as amended, to increase the U. S. share of allowable project costs under such act; to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

. . . .

[p. 2] . . . .

"State Taxation of Air Commerce

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the terri-

tories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling [p. 3] *in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; Provided, however, That any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.*

"(*b*) *Nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.*

"(*c*) ***In the case of any airport operating authority which—***

> "(*1*) ***has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;***

"(2) is collecting, without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until July 1, 1973.".

(b) That portion of the table of contents contained in the first section of such Act which appears under the center heading "Title XI—Miscellaneous" is amended by adding at the end thereof the following:

"Sec. 1113. State taxation of air commerce.".

An the House agree to the same.

That the House recede from its amendment to the title of the Senate bill.

Harley O. Staggers,
John Jarman,
John D. Dingell,
James Harvey,
Dan Kuykendall,

Managers on the Part of the House.

Warren G. Magnuson,
Howard W. Cannon,
Philip A. Hart,
Norris Cotton,
James B. Pearson,

Managers on the Part of the Senate.

118 CONG. REC. 35,116 (OCT. 11, 1972).

CONFERENCE REPORT ON S. 3755, AIRPORT DEVELOPMENT ACCELERATION ACT OF 1972

Mr. STAGGERS. Mr. Speaker, I call up the conference report on the bill (S. 3755) to amend the Airport and Airway Development Act of 1970, as amended, to increase the U. S. share of allowable project costs under such act; to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes, and ask unanimous consent that the statement of the managers be read in lieu of the report.

. . . .

Mr. KYL. Can the gentleman from West Virginia tell the House what provision is now in the bill relative to the local collection of taxes on passengers using the airports?

Mr. STAGGERS. They will be prohibited under the bill. In lieu of that we have raised the assessments and the moneys to each one of the airports from 50 to 75 percent, local participation, and raised the amount of money in the fund that can be used at these airports.

. . . .

The conference report was agreed to.

A motion to reconsider was laid on the table.

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118 CONG. REC. 35,860 (OCT. 13, 1972).

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1972—CONFERENCE REPORT

Mr. CANNON. Mr. President, I submit a report of the committee of conference on S. 3755, and ask for its immediate consideration.

. . . .

Mr. CANNON. Mr. President, the House of Representatives has adopted the conference report on S. 3755. I ask unanimous consent that the report together with the explanation of the conference agreement be printed in the Record at this point.

There being no objection, the report and the explanation were ordered to be printed in the Record, as follows:

. . . .

Sec. 7. (a) Title XI of the Federal Aviation Act of 1958 is amended by adding at the end thereof the following new section:

"State Taxation of Air Commerce

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom: *Provided, however,* That any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possession of the United States or political agencies of two or more States) which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

"(b) Nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or

collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges, from aircraft operators for the use of airport facilities.

"(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

"(2) is collecting, without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans.

the provisions of subsection (a) shall not apply to such authority until July 1, 1973.".

State Taxation of Air Commerce

Senate bill

Section 7 of the Senate bill provided for a permanent prohibition against the levy or collection of a tax or other charge on persons traveling in air commerce or on the carriage of persons so traveling or on the sale of air transportation or on the gross receipts derived therefrom by any State or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, territories or possessions of the United States or political agencies of two more States. There

were two exemptions from this prohibition. First, any State which levied and collected such charges before May 21, 1970, would be exempt from the prohibition until July 1, 1973. Second, any airport operating authority which (1) has an outstanding obligation to repay money borrowed and expended for airport improvements, (2) has collected a head tax on air passengers, without carrier assistance, for the use of its facilities, and (3) has no authority to collect any other type of tax to repay the loan, would be exempt from the prohibition until July 1, 1973.

The Senate bill also provided that the prohibition would not extend to the levy or collection of other taxes, such as property taxes, net income taxes, franchise taxes, and sales or use taxes, nor to the levy or collection of other charges such as reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of aircraft facilities.

House amendment

The first section of the House amendment provided for an 18-month moratorium on the levy or collection of any tax, fee, or other charge on persons traveling in air transportation or on the carriage of persons in air transportation.

Section 2 of the House amendment provided for an investigation of fees and charges levied and collected by States on persons traveling in air transportation in order to determine the effect of such charges on air transportation in the United States. The investigation was to be conducted by the Civil Aeronautics Board, which was required to report the results of the investigation to the President and to the Congress, together with its recommendations, not later than twelve months after the date of enactment of this legislation.

The House amendment authorized an appropriation of $100,000 to carry out the investigation.

Conference substitute

The conference substitute is the same as the Senate bill.

. . . .

Mr. CANNON. . .

. . . .

Notwithstanding my disappointment on that facet of the conference agreement, the conference report represents an excellent piece of legislation and is a great step forward in providing more Federal assistance in developing the Nation's air transportation system without burdening passengers with locally imposed discriminatory taxation.

Mr. President, I urge the Senate to unanimously approve the conference report on S. 3755 so that it will be sent to the White House without delay. We expect the President to approve the bill, particularly because of the important Federal commitment to help local communities finance security programs to thwart the threat of air piracy, violence, and terrorism.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The report was agreed to.

Mr. CANNON. Mr. President, I ask unanimous consent that the conference report not be printed.

The PRESIDING OFFICER. Without objection, it is so ordered.

. . . .

118 CONG. REC. 37,202-03 (OCT. 18, 1972).

BILLS DISAPPROVED AFTER SINE DIE ADJOURNMENT

The President announced his disapproval of the following bills with memorandums of disapproval as follows:

. . . .

Airport Development Acceleration Act

(S. 3755)

This bill would increase Federal expenditures and raise percentage participation in categorical grant programs with specific and limited purposes. I believe this would be inconsistent with sound fiscal policy. Airport development funds have been almost quadrupled since 1970 under this administration.

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119 CONG. REC. 213-16 (JAN. 4, 1973).

By Mr. CANNON (for himself and Mr. Magnuson):

S. 38. A bill to amend the Airport and Airway Development Act of 1970, as amended, to increase the U. S. share of allowable project costs under such act; to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes. Referred to the Committee on Commerce.

By Mr. CANNON (for himself and Mr. Magnuson, and Mr. Robert C. Byrd):

S. 39. A bill to amend the Federal Aviation Act of 1958 to provide a more effective program to prevent aircraft piracy and for other purposes. Referred to the Committee on Commerce.

Mr. CANNON. Mr. President, I send to the desk two bills for appropriate reference dealing with pressing civil

aviation problems—both bills passed the Senate during the 92d Congress, however, neither was enacted into law. Mr. President, following my introductory remarks I ask unanimous consent that the two bills be printed in the Record.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibits Nos. 1 and 2.)

. . . .

The Airport Acceleration Development Act of 1973

Mr. President, the second bill I introduce today [S. 38] is titled "The Airport Acceleration Development Act of 1973." This bill was passed by the Senate in August of 1972, a similar version was later passed by the House and Senate-House conferees agreed on a compromise measure in October. After adoption of the conference report, the bill was sent to the White House.

Mr. President, acting after Congress had adjourned, President Nixon vetoed this most important bill without giving Congress the opportunity to override his action—the result was the failure of any legislative action in this vital area. I assure my colleagues that the bill I introduce today—which is nearly identical to the version approved by the Senate on August 10—will be the subject of speedy action by the Senate Commerce Committee and will be before the Senate for consideration in just a few weeks. I have been assured by my colleagues in the House that the other body will also take early action on this matter in hopes of sending it to the White House again early in the session.

This bill provides a great new source of funds for airport development and improvement throughout the United States. The bill will reduce substantially the reliance on locally generated funds for airport development and will place a greater burden and responsibility on the U. S. Gov-

ernment to encourage, promote and finance aviation facilities which are required in the national air transportation system.

The bill provides that the cost of this increased Federal participation will be borne by the users of the system, not the general taxpayer. The airlines, airline passengers and shippers, and aircraft owners and operators all contribute to the development of the system by paying user taxes established in 1970. During the current fiscal year those taxes will filter down to local governments—airport sponsors—to meet local and national needs.

In providing for a greater Federal role and responsibility in airport development the bill also prohibits local head taxation on passengers or on the carriage of passengers. The Commerce Committee, and I believe the Senate, believes such taxation to be inimical to the development of the national system funded in large part by uniform Federal taxes.

My bill amends the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958 so as to increase Federal financial assistance for airport development throughout the United States. It also prohibits the levying, by State and local governments, of passenger "head" taxes or use taxes on the carriage of persons in air transportation.

The legislation to provide increased Federal participation in airport development grants is required because of the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operated, and maintain the Nation's system of publicly-owned airports. The funds required to increase the Federal share of airport development grants will come from the airport and airway trust fund established by the Airport and Airway Revenue Act of 1970. No new taxation or no expenditure of general U. S. funds will be required as a result of the legislation.

The bill prohibits any government agency other than the United States from establishing or levying a passenger

head tax or use tax on the carriage of persons in air transportation. This prohibition will insure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

Mr. President, I will briefly review the provisions of this bill. (*Id.* at 214).

. . . .

Section 7 of the bill adds a new section 1113 to the Federal Aviation Act of 1958 prohibiting any tax, fee, head charge, or other charge directly or indirectly, on persons traveling in air transportation or on the carriage of persons in air transportation or on the gross receipts derived therefrom. The bill allows, however, for the continuation of the levy and collection of other reasonable rental charges, landing fees, and other service charges for the use of airport facilities.

Summing up, quickly:

First. The bill increases Federal grant-in-aid payments from 50 percent to 75 percent on airport airfield development projects at all but the 22 largest airports in the United States.

Second. Terminal area development related to the movement of passengers and their baggage through the airport will be eligible for 50-percent Federal funding. Currently, such development is not eligible for Federal assistance.

Third Development required as a result of airport certification regulations or airport security regulations will be eligible for grant-in-aid assistance of 82-percent Federal participation. Currently, Federal participation for this type of project is limited to 50 percent.

Fourth. Total amounts available for airport development grants each year is increased from $280 million to $420 million—an increase of $140 million per year to be financed entirely by user taxes.

Fifth. And finally, S. 3755 provides a prohibition against levying or collecting State and local government passenger head taxes or taxes on the sale of air transportation.

Mr. President, the passage of this bill will have a significant impact on the financing of local governmental affairs. At nearly all of the Nation's almost 3,000 publicly owned and operated airports, the U.S. Government will assume 75 percent of the responsibility for development of new and improved airfield facilities. And this increased Federal support will not come from general tax dollars; it will come from taxes on the users of the air transportation system.

The passage of this legislation will enable local government bodies, particularly smaller towns, counties, and communities to more easily fund other vital community programs such as schools, roads, sewers, police protection, and other services with money which might have been required for aviation facilities development. With greater Federal assistance to meet airport needs, scarce local funds will be available for other uses.

Mr. President, the Airport and Airway Development Act of 1970 was landmark legislation; for the first time it provided local governments a vast new source of funds to develop new and improved airports. At the same time it created a well-funded program to upgrade, modernize, and expand our air navigation facilities throughout the United States so as to improve the safety and efficiency of the system. Mr. President, the act today is working well. With the changes proposed in my bill the program will become even more responsive to the needs of the national system and to the needs of local governments who are partners with the Federal Government in developing a truly national and uniform air transportation system.

Exhibit 1

S. 38

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Airport Development Acceleration Act of 1973". (*Id.* at 215).

. . . .

"State Taxation of Air Commerce

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom: *Provided, however,* That any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

"(b) Nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

"(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

"(2) is collecting, without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until July 1, 1973."

(b) That portion of the table of contents contained in the first section of such Act which appears under the center heading "TITLE XI—MISCELLANEOUS" is amended by adding at the end thereof the following: "Sec. 113. State taxation of air commerce.". (*Id.* at 216).

SENATE

92nd Congress
1st Session

Report
No. 93-12

AMENDING THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970 AND THE FEDERAL AVIATION ACT OF 1958

February 1, 1973.—Ordered to be printed

MR. CANNON, from the Committee on Commerce, submitted the following

REPORT

[To accompany S. 38]

The Committee on Commerce, to which was referred the bill (S. 38) to amend the Airport and Airway Development Act of 1970 to increase the United States share of allowable projects costs under such Act; to amend the Federal Aviation Act of 1958 to prohibit certain state taxation of persons in air transportation, and for other purposes having considered the same, reports favorably thereon with one technical amendment and recommends that the bill (as amended) do pass.

"Text of S. 38, as Reported"

The amendment is indicated as follows: Omit the part in brackets and insert the part printed in italic.

A BILL To amend the Airport and Airway Development Act of 1970, as amended, to Increase the United States share of allowable project costs under such Act, to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-

sembled, That this Act, may be cited as the "Airport Development Acceleration Act of 1973".

. . . .

[p. 3] . . . .

"State Taxation of Air Commerce

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom: *Provided, however,* That any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

"(b) Nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from [p. 4] the levy or collection of taxes other than those enumerated in sub-section (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services and nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the

Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

"(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans in amounts borrowed and expended for airport improvements;

"(2) is collecting, without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans.

the provisions of subsection (a) shall not apply to such authority until July 1, 1973."

(b) That portion of the table of contents contained in the first section of such Act which appears under the center heading "Title XI—Miscellaneous" is amended by adding at the end thereof the following:

"Sec. 1113. State taxation of air commerce.".

Sec. 8. Section 12(a) of the Airport and Airway Development Act of 1970 (49 U. S. C. 1712), is amended by striking out the words "two years" in the first sentence thereof and by inserting in lieu thereof "three years".

Purpose

S. 38 amends the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958 to increase Federal financial assistance for airport development throughout the United States. It also prohibits the levying, by State and local governments, of passengers "head" taxes or use taxes on the carriage of persons in air transportation.

The legislation to provide increased Federal participation in airport development grants is required because of the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the nation's system of publicly-owned airports. The funds required to increase the Federal share of airport development grants will come from the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970. The fund is funded from revenues from user taxes on aviation-system users and contains and will contain adequate revenues to cover the cost of the increased Federal assistance. No new taxation and no expenditure of general U. S. funds will be required as a result of the legislation.

The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

[p. 5] Section-by-Section Analysis

. . . .

[p. 6] . . . .

Section 7 of the bill adds a new Section 1113 to the Federal Aviation Act of 1958 prohibiting any tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or on the carriage of persons in air transportation or on the gross receipts derived therefrom. The bill allows, however, for the continuation of the levy and collection of reasonable rental charges, landing fees, and other service charges for the use of airport facilities. However, State jurisdictions meeting certain criteria established in the bill are given until July 1, 1973 to comply with the prohibition.

Finally, Section 7(b) of the bill amends the table of contents of the Federal Aviation Act to reflect the addition of the new Section 1113.

The only amendment to S. 38 adopted by the Committee was a technical one which corrected a drafting error made when the bill was introduced. In all other respects the bill is the same as introduced and very similar to S. 3755 as passed by the Senate on August 10, 1972.

. . . .

[p. 11] . . . .

S. 38 contains a prohibition on State taxation of passengers or on the carriage of passengers in air transportation. This prohibition will [p. 12] potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax. This provision will be discussed later but the Committee points out here that in denying government agencies potential revenues from passenger head taxes, it is also responding to the local need for greater Federal assistance in airport grants.

. . . .

[p. 17] . . . .

(4) PROHIBITION OF STATE AND LOCAL TAXATION

S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.,* upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes". While this decision has invited state and local governments to enact head taxes

or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

The Court upheld the validity of a city-imposed "use and service charge" of $1 for each enplaning commercial passenger at Evansville, Indiana, and a New Hampshire state law levying $1 charge for a passenger on large commercial airlines, and 50¢ a passenger charge on smaller planes. In Evansville, the money, to be collected directly from passengers by the airlines, was earmarked for maintenance and improvements at the airport. In New Hampshire, the state fixed the charge directly on the airlines, with half of the revenue to go into the state aeronautical fund and the balance going to the airport authority. The Court, in essence, ruled that states and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers in order to underwrite airport operational and development costs. Yet, the decision did not sufficiently define the ruling as, for example, what constitutes a reasonable charge, or just how far a state or municipality could go in levying head taxes. Obviously, the decision raised more questions than it answered, and the result was predictable.

It is significant that revenues which would be derived from some of these local or state head taxes would not be earmarked for airport development, but would be used to gain financial windfalls. The most blatant example of this is Philadelphia which imposed a $2 head tax on enplaning as well as deplaning passengers, with the funds going, unearmarked for airport development, into the cities' general fund. So the head tax has already grown from a 50¢ charge for air commuter passengers in New Hampshire to a $4 charge for a Philadelphia round-trip.

Recent experience with the Philadelphia tax is indicative of the chaos which such local taxation works on the national air transportation system. The head tax brings on confusion, delay, anger and resentment and cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes. Two newspaper accounts are printed below describing the

situation created by the Philadelphia head tax which became effective July 1, 1972:

[p. 18] [From the Philadelphia Inquirer, July 2, 1972]

Thousands Balk at Airport Tax; Long Lines Delay Flights Out

(By Jan Schaffer)

Departing flights at Philadelphia International Airport were delayed as long as one hour Saturday as thousands of passengers refused to pay the city's new $2 one-way, $4 round-trip transit tax.

"It's chaos down here. It hasn't been this bad since Christmas," said TWA customer services agent Bea Lutz as crowds of travelers chose to fill out lengthy refusal forms rather than pay the new levy.

"We can't even see the end of the line from behind the counter up here."

After the tax went into effect at midnight Saturday, some airlines reported that up to 50 percent of their customers were refusing to pay.

"We had special refusal vouchers printed up and we had to get more printed today," said TWA public relations director Robert Hall. "I'd say 30 to 40 percent are refusing to pay."

At Allegheny Airlines counter, Tom Fitzmorris, assistant passenger services manager, said "40 to 50 percent" of his customers were filling out forms rather than handing over the $2.

United Airlines reported a 10 percent refusal rate and Eastern about 20 percent.

"This city is really scratching for your last buck when they start taxing someone who's just passing through," said one airport user, Phil Gasser, who was en route home to Waukesha, Wis.

One traveler heading for Los Angeles said the delays caused by attempting to collect the money from disgruntled passengers caused him to miss his plane.

"We had to stand in line two times," he said.

Although the airlines had sought a preliminary injunction against collection of the tax, Common Pleas Judge Frank J. Montemuro refused their plea last week.

At the same time, however, he said the city—which estimated it will gain $14 million annually through receipt of the levy—cannot impose penalties on airlines if they fail to collect all the taxes due.

[From the Philadelphia Evening Bulletin, July 1, 1972]

Grumbling Is the Order of the Day as $2 Airport Head Tax Hits Phila.

(By Douglas D. Gill and Ned Warwick)

Philadelphia's new $2 tax on passengers arriving and departing at Philadelphia International Airport went into effect today.

[p. 19] The tax was greeted by the same grumbling that has greeted new taxes since governments first imposed them.

"An airport head tax? That's ridiculous," said Malcolm Fry, of 520 Acorn St., Roxborough, as he and his wife, Lois, arrived at 12:35 A. M. on an Eastern Airlines flight from Miami.

Fry and other passengers whose flights took off before the tax was imposed at midnight didn't have to pay the new levy.

But the new charge was made on tickets for flights leaving after midnight, regardless of whether the tickets were bought before the tax went into operation.

Pay Again?

One of the first to pay the tax was Sam Palmieri of Stratford, N. J., who bought two round-trip tickets for a flight July 6 to San Juan, P. R., for himself and his wife. He paid $280 for the tickets and $4 for two departure taxes.

Palmieri asked the American Airlines ticket seller, "How do I get back into Philadelphia? Will I have to pay again?"

"Oh Lord, yes, you will," she said. "I forgot to put that onto your bill. Oh well, I suppose somebody will ask you for it when you get back. Don't worry about it until then."

"Hell, I just won't come back," Palmieri said.

Dave Strode of 35 Evergreen lane, Haddonfield, N. J., was in line behind Palmieri and bought a one-way ticket to Atlanta. He's a student at Georgia Tech and says he flies to Georgia and back about nine times a year.

$40 a Year

"That means at $4 each time, I'll be paying almost $40 to Philadelphia every year," he said. "They don't give me anything for it."

City Council adopted the new levy by a 15-0 vote May 25. Because of Mayor Rizzo's campaign promise not to raise taxes, city officials have billed the new tax as a "user charge" instead of a tax.

"Whatever they call it, I think it stinks," said Robert Maler, a ticket agent for American Airlines.

Airport a Mess

"Nobody would mind paying this tax if they had a decent airport to come to," he said. "As it is, it's a mess. Temporary wood and cardboard partitions are everywhere and have been for as long as I can remember. Trash is all over the floor. Just look at it. This airport ist he

most inconvenient of any I've ever been in. We're all going to have to start apologizing for the city.

Donna Iacino, who was behind the American counter with Maier, said, "Why doesn't the city have its own agents down here to collect it themselves? Why should we do their work for them. They're not paying us any salary."

[p. 20] James Jensen of Wilmington, a chemist, told about the tax by a report, said, "Oh my God! I've got five children with me. What am I going to do now?"

7 to Chicago

He and his wife and family were flying to Chicago (sic) Trans World Airlines on their way to Appleton, Wis., for a vacation.

"I'll just have to refuse to pay the tax and worry about it later," Jensen said.

Airlines provided passengers with refusal forms if they did not wish to pay the tax. The airlines are required to fly passengers whether they pay the tax or not. In such cases it will be up to the city to collect the tax. The forms list the refuser's name and address.

At Departure Gates

TWA collected the tax at the departure gates. The other airlines collected it at the ticket counters.

"I'm not against the head tax," Jensen said. "It's just that I wish we had had a little former warning."

Alvin White, 50, of 5719 N. 19th St. said, "I hate it like hell. Boy do I hate it. I realize the airport needs improvement, but this is a heck of a way to raise money. I think it's going to impede traffic in and out of Philadelphia."

White, an engineer, was flying a TWA plane to Kansas City.

Refusal Forms

Don Quinn, customer service agent for TWA, said seven of 31 passengers for a Pittsburgh flight filled out refusal forms.

John Greto, an American Airlines ticket agent, said 10 passengers had filled out refusal forms by 8 A. M.

"You have the right to refuse to pay this head tax." Ray Curran, an Allegheny Airlines ticket agent, told Leo Curran, 26 (no relation), of Richboro, Bucks County.

"I don't know," Leo said. "Should I fill out the form? What will happen to me?"

"I'm not really sure," the ticket agent said. "I guess they'll probably come after you to collect it."

"Fill Out Form"

Leo's wife, Dorothy, 25, said, "Fill out that form. We're not going to pay any $12 extra." Leo, a teacher, followed his wife's instructions and filled out the form. He, his wife and his mother were flying to Boston.

In 1970, this Committee and Congress passed the Airport and Airway Development Act in order to provide for urgently needed improvements in the national air transportation system. An Aviation Trust Fund was created, along with a variety of user charges to assure [p. 21] adequate and sustained funding. An 8 percent charge was levied on domestic passengers, and $3 per person on international trips. Congress thereby established a uniform national program of taxation and funding for airport improvements. This Committee never intended that air travelers would be subject to state and local head taxes as well as to national user charges. The Committee believed there was no danger of this because the basic constitutional guarantee of a citizen's right to unhindered interstate travel, and a U. S. Supreme Court decision which had prevailed since 1867, indicated that such taxes

could not be constitutionally imposed. It is unfair that this is happening now since state and local head taxes constitute an inequitable, double burden of taxation on air passengers. Obviously, this runs counter to the whole concept of uniformity underlying the Airport and Airways Development Act, and the maintenance of a national air transportation system.

The Air Transport Association of America, the airlines trade group informs the Committee that as of January 30, at least 31 jurisdictions have enacted passenger charges and proposals for such charges are pending in many other localities. Below is a table, supplied by the Association, indicating the jurisdictions charging head taxes, the amount, the effective date and the source of collection.

[Table omitted listing thirty-one jurisdictions with head taxes.]

The airlines testified that in Mobile, Ala., where they have been collecting a head tax, one thing is clear—it makes people mad. It takes time to process a passenger; the carriers say that collecting the head tax adds at least 45 seconds per customer. Such difficulty in a smaller station is nothing compared to the congestion that could take place at New York, or some other large terminal. These processing delays concern the Committee. People don't like taxes, in general, and head taxes are particularly annoying.

[p. 22] Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel.

If the passenger must pay a local head tax, it adds directly to the cost of his trip. And if head taxes are absorbed by the carriers, where law permits, because of the cost and difficulty of collection, or even refusal of passengers to pay, it still will lead to increased air travel costs. If the carriers had to absorb $1 for every air passenger carried last year, that would amount to $170 million. The airlines could not reasonably be expected to bear such a

burden. In the end, a fare increase would have to be implemented. Thus, the air passenger loses either way on state and local hear taxes. In addition, there would come a point when this added cost could make air travel uneconomical for some people, and thus inhibit the growth of the air transportation system, particularly in short-haul markets.

The head tax imposes a flat rate on passengers, regardless of the distance traveled by the passenger. Therefore, the "short haul" passenger, paying a $1 tax has the price of his ticket increased about 10% while a transcontinental passenger's ticket increases less than 1%. Since the head tax substantially increasts the cost of a short haul flight, a person may turn to other modes of transportation. We believe that the addition in Philadelphia of $4 to the cost of a round trip fare will have this effect, causing severe problems for the substantial local and commuter service there. The diversion of this traffic from such air carriers would have a damaging effect on service to many smaller communities.

One commuter airline testified before the Committee that some short-haul airline fares have increased by more than 20% as a result of the Philadelphia tax. Certainly such taxation is a burden on air transportation and will serve to inhibit the growth and usefulness of air transport for travel involving short distances.

Quite clearly, if head taxes are to be used for non-aviation purposes, or for programs which don't benefit the airport system where it is collected, such taxes are not equitable. In addition, state and local head taxes to raise funds for airport development can be precluded, for they should not be necessary. Air passengers are already being charged sufficiently at the Federal level through an 8 percent user charge on domestic tickets and $3 per person on international tickets, and it is not necessary to place a double burden on them.

The bill reshapes the airport grant-in-aid program making use of the air passenger's money that is already

in the Aviation Trust Fund, thereby making it easier for local communities to finance airport needs and ensuring that there is no need to resort to local head taxes.

A legal memorandum from the Senate legislative counsel to the Committee regarding passenger head taxes is printed below.

. . . .

[p. 25] . . . .

Conclusion

S. 38, as explained above, provides a great new source of funds for airport development and improvement throughout the United States. The bill, if enacted, will reduce substantially the reliance on locally-generated funds for airport development and will place a greater burden and responsibility on the United States to encourage, promote, and finance aviation facilities which are required in the national air transportation system.

The bill provides that the cost of this increased Federal participation will be borne by the users of the system, not the general taxpayer. The airlines, airline passengers and shippers, and aircraft owners and operators all contribute to the development of the system by paying user taxes established in 1970. S. 38 provides that a greater share of the revenues from these taxes will filter down to local governments—airport sponsors—to meet local and national needs.

[p. 26] In accepting a greater Federal role and responsibility in airport development the Committee has also ated to prohibit local taxation on passengers or on the carriage of passengers. We believe such taxation to be inimical to the development of a national system funded in large part by uniform Federal taxes. Currently, some disagreement exists within the Administration as to whether the Committee action increasing Federal participation in airport development is warranted at this time. The Committee, however, is convinced that it is.

Nonetheless, the Committee views S. 38 as an aviation development package—the components of which cannot be separated. We believe that if the prohibition on local head taxes was not a part of the total new program, there would be need to re-evaluate the increased Federal funding for airport development projects called for in S-38. If local taxes on passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program. If local head taxes become a significant airport funding mechanism the public interest may well require a reduction in Federal user taxes and a diminution of Federal participation in airport development projects.

Therefore, by prohibiting state taxation on passengers or on air transportation, the Committee has accepted greater responsibility for U. S. assistance, believing that the two actions must be viewed together and that neither should stand alone without the other.

119 CONG. REC. 3,196-97 (FEB. 2, 1973).

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the pending business be laid aside temporarily and that the Senate turn to the consideration of Calendar No. 19, S. 38, that it be laid before the Senate and made the pending business.

The PRESIDING OFFICER. The clerk will report the bill.

The assistant legislative clerk read as follows:

A bill (S. 38) to amend the Airport and Airway Development Act of 1970, as amended, to increase the United States share of allowable project costs under such act, to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes.

[The same text that appears in the Congressional Record at Jan. 4, 1973, was read again].

. . . .

Mr. MANSFIELD. Mr. President, there will be no discussion or debate on this bill this afternoon that I know of.

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119 CONG. REC. 3,348-61 (FEB. 5, 1973).

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973

The PRESIDING OFFICER (Mr. Baker). Under the previous order, the Senate will now resume the consideration of S. 38, which the clerk will state by title.

The assistant legislative clerk read as follows:

A bill (S. 38) to amend the Airport and Airway Development Act of 1970, as amended, to increase the United States share of allowable project costs under such act, to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes.

. . . .

Mr. CANNON. . . .

. . . .

As most of my colleagues know, S. 38 is almost identical to S. 3755 of the 92d Congress, the bill passed by the Senate on August 10, 1972, by a vote of 83 to 2. Following passage by the Senate last year, the House passed a very different version. In fact, the House bill had only one significant provision. It prohibited, for an 18-month period, State and local head or use taxes on passengers in air transportation. It did not address itself to the serious, sometimes even critical financial needs of the Nation's local governmental units which own, maintain, and operate the nearly 3,000 publicly owned airports in the United States—the needs that some communities were trying to meet by levying local head taxes or use fees on passengers in air transportation.

The House did not concern itself with the airport development program but chose simply to deal with the "head tax problem," by postponing a final decision on the issue for 18 months, during which time a moratorium would be imposed.

We in the Senate can take pride in the fact that our solution to the head tax problem was much broader. Our bill of last year did prohibit head taxes, user taxes, gross receipts taxes, and other forms of State and local taxation on airline passengers or on the carriage of airline passengers. But the bill did much more than that. It created a much more ambitious program to provide additional Federal funds, trust funds, to assist local governments in meeting their needs to develop additional and expanded air transportation facilities.

And this new program, created by the Senate and opposed by the administration, would not have cost U. S. taxpayers an additional dime. The program was to be entirely funded from revenues in the airport and airway trust fund, revenues which result from Federal user taxes on passengers, airlines, and private aircraft owners and operators who take advantage of the U. S. air transportation system.

Under the current user tax structure which was adopted by Congress in 1970, there are more than adequate revenues coming into the trust fund to pay for the additional Federal financial assistance that we provided for in our program. User taxes would not have to be increased to pay for the additional Federal assistance.

After weeks of very difficult negotiations with the House in conference on this bill last year, we finally succeeding in preserving, in the compromise bill, most of the favorable features of S. 3755.

On October 27, after we adjourned, President Nixon vetoed this very important legislation and issued a vague statement indicating that the issues involved in the bill needed more study.

Because the legislation has enjoyed wide support from the aviation community, the public, and from local governments across the Nation, Senator Magnuson and I reintroduced the measure on the opening day of the 93d Congress in order to quickly give the Congress another opportunity to express itself on the issue.

We were of the view that, since we had conducted thorough hearings on the bill last year, additional hearings were not necessary. Accordingly, the bill was considered and discussed in executive sessions of both the subcommittee and the full Commerce Committee last week.

. . . .

Finally, Mr. President, S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each

year. The bill prohibits the levying of State or local head taxes, fees, gross receipts taxes or other such charges either on passengers or on the carriage of such passengers in interstate commerce.

In 1970, Congress established a national, uniform system of user taxation on all users of the air transportation system and levied a tax of 8 percent on all airline tickets. That user tax was intended to finance aviation facilities development through a national program and Congress intended at the time that the Federal tax be the only tax on airline passengers.

Last year, however, the U. S. Supreme Court upheld the validity of several State and local passenger head taxes, overturning a precedent established more than a hundred years ago.

Since that time many communities have enacted passenger head taxes of one kind or another which vary in rate, scope and applicability. The committee views these taxes as an unnecessary and discriminatory burden on passengers in air transportation and as a form of double taxation which we did not intend when, in 1970, we enacted a national system of aviation user taxation.

Presently, at least 31 different government jurisdictions have levied head taxes and many other communities are in the process of doing so or are seriously considering it. We believe this proliferation of local taxes can and will undermine a sound national transportation system by causing confusion, delay, inequities, and discrimination in air transportation and must be prohibited before it gets any further out of hand. There is no need for two systems of user taxation; particularly in light of the increased Federal assistance to airports provided for in this bill.

Mr. President, we view S. 38 as an aviation development package, the components of which cannot be separated. We believe that, if the prohibition on local head taxes was not a part of the total new program, there would be need to re-evaluate the increased Federal funding for airport development projects called for in S. 38. If local

taxes on passengers and air carriers are allowed to proliferate nationally, and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program.

By prohibiting State taxation on passengers or on air transportation, the committee has accepted greater responsibility for U. S. assistance. With the increased Federal assistance, we can see no valid reason for the continuance of local passenger taxation. (*Id.* at 3349).

. . . .

Mr. PEARSON. . . .

. . . .

I strongly recommend passage of the pending bill. The following points may be made in support of this position.

. . . .

State and Local Taxation of Air Fares

Finally, Mr. President, the committee bill prohibits State and local taxation of air fares. The Congress intended in 1970 to preempt the States and localities from levying such taxes, as taxation on air fares is one of the predominant sources of revenue for the trust fund. Recent Supreme Court decisions necessitate the clarification of this congressional policy determination.

If more than 500 localities—or even a significant proportion of this number—were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce. The national system of air service upon which 180 million airline passengers depend annually would become a hodgepodge of Balkanized assessments and levies against nonresident travelers whose business or leisure takes them across State lines. The committee bill prohibits State and local taxation of air fares, but this Federal premption is carefully balanced by substantial increases in trust fund assistance for airport development and modernization. (*Id.* at 3350).

. . . .

Mr. PEARSON. Mr. President, I rise to speak in opposition to the amendment [to change the formula for distribution of funds from the trust fund to various sizes of airports] of the distinguished Senator from Kentucky.

One really needs to go back to the initial purposes of the hearings which gave birth to this particular bill. Those hearings addressed themselves to a situation whereby community after community and city after city, were either imposing or beginning to impose a so-called head tax upon passengers who would embark or depart from aircraft.

This was really most inconsistent with the original intents and purposes of the trust fund concept as passed some years ago. The havoc that would have resulted in the airports of this country as the different kinds of head taxes were imposed for different purposes and in different amounts, as well as all the congestion and traffic that would have been imposed, led the committee to judge that there should be a prohibition against head taxes such as this. (*Id.* at 3352).

. . . .

Mr. HARTKE. . . .

. . . .

Mr. President, those portions of S. 38 which deal with State taxation of air commerce are before us today because of a lawsuit which involved the Evansville-Vanderburgh Airport. That airport handles more than 329,000 passengers each year. It serves not only Vanderburgh County but 40 other counties in the surrounding area. To ask the residents of Vanderburgh County to bear through the property tax the burden of operating a rapidly expanding airport which serves 40 other counties is to place an unfair and unjust burden on the property owners in Vanderburgh County.

Mr. President, S. 38 is the successor to S. 3755 which passed the Senate overwhelmingly during the last session.

The size of that vote is a recognition of the fact that head taxes are a hindrance to air commerce. But the provisions of S. 38 do not provide an adequate substitute. For many airports it will be meaningless to raise the Federal share from 50 to 75 percent because they do not have the funds available to raise the 25-percent local share. For this reason I intend to offer later in this session, legislation which will revamp the financing of airports and the financing of of the Nation's aviation system as a whole. (*Id.* at 3356).

. . . .

So the bill (S. 38) was passed, as follows:

S. 38

An Act to amend the Airport and Airway Development Act of 1970, as amended, to increase the United States share of allowable project costs under such Act, to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes (*Id.* at 3360).

. . . .

"State Taxation of Air Commerce

"Sec. 1113. (a) No State (or political subdivision thereof, including the commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom: *Provided, however,* That any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons

traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

"(b) Nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

"(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

"(2) is collecting, without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans, the provisions of subsection (a) shall not apply to such authority until July 1, 1973."

(*Id.* at 3361).

. . . .

119 CONG. REC. 3,928 (FEB. 8, 1973).

AIRPORT AND AIRWAYS IMPROVEMENT ACT OF 1973

(Mr. ADAMS asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. ADAMS. Mr. Speaker, I am introducing today the Airport and Airways Improvement Act of 1973. The principal purpose of this bill is to abolish the discriminatory and capricious head tax on air passengers which has been arbitrarily imposed on travelers at more than 31 airports throughout the country. This tax is unfair because it not only falls on top of the 8 percent tax on tickets already paid by air passengers, but differs in amount from airport to airport. As a flat tax rather than a percentage tax, these head taxes are more burdensome on those flying short distances than long. They fly in the face of the uniform tax system established by the Airways and Airport Act of 1970; they are in effect double taxation on air passengers.

The bill recognizes the need for increased financing for airport development. The head tax is no solution to this problem—in some instances, the head tax receipts go into general revenues and are not even earmarked for airport development. The logical source for this financing is the trust fund established under the Airport and Airways Act. This fund, created by user charges, is already in substantial surplus. My bill would increase the Federal share in airport development projects from 50 percent to 75 percent. Many airport projects have been held back because of the inability of local sponsors to meet the dollar for dollar matching requirement. Hopefully, this increase in the Federal share will help to overcome these roadblocks.

Mr. Speaker, I believe that this bill is of the greatest importance to the millions of American air travelers.

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973

HEARINGS

Before the

SUBCOMMITTEE ON

TRANSPORTATION AND AERONAUTICS

of the

COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

Ninety-Third Congress

First Session

on

H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38

(and all similar bills)

Bills to Amend the Airport and Airway Development Act of 1970 to Increase the United States Share of Allowable Project Costs Under Such Act; to Amend the Federal Aviation Act of 1958 to Prohibit Certain State Taxation of Persons in Air Commerce; and for Other Purposes

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March 14, 15, 20, 22, and 27, 1973

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[p. 96] . . . .

STATEMENT OF STUART G. TIPTON, CHAIRMAN, AIR TRANSPORT ASSOCIATION OF AMERICA; ACCOMPANIED BY LEO SEYBOLD, VICE PRESIDENT, FEDERAL AFFAIRS

Mr. Tipton. Mr. Chairman, I appreciate the opportunity to appear before this committee.

I have a very short statement here so if I may, I will proceed through it.

Mr. Jarman. That is fine.

Mr. Tipton. Mr. Chairman, I am Stuart Tipton, chairman of the board of the Air Transport Association, which represents virtually all of the Nation's scheduled air carriers. On their behalf, as well as the millions of people who use the national air transportation system annually, I want to express appreciation for your timely action in holding these hearings, for the issues of head taxes, gross receipts taxes and airport improvements are of critical importance to them. You will recall that I submitted detailed comments on these issues last session and a copy of that statement is attached for your reference.[1]

[p. 97] We had hoped that these issues would be resolved by the enactment of the legislation agreed upon by the House-Senate conferees last year. We were disappointed when S. 3755 was vetoed, and frankly puzzled that it was considered in the same category as general revenue measures, since the bill involved only revenues from user charges in the trust fund. The part of the veto message which stressed that airport funds have quadrupled since 1970 was further perplexing, since such an acceleration in airport improvement is what the administration must have

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[1]See pp. 65-75, "Air Passenger Fees—State and Local Charges," hearings before the Subcommittee on Transportation and Aeronautics, Interstate and Foreign Commerce Committee, 92d Cong., second sess., serial No. 92-74.

had in mind when it promoted special taxes on users to assure such development.

All in all, the veto was quite ironic. The need for such legislation has increased, not diminished over the past months and we urge you to again act to prevent the levying of discriminatory State or local taxes on travelers and air commerce, while providing for necessary improvement to the Nation's airport system.

The airlines believe that it is essential to maintain the national character of the airport and airways system, and that a multiplicity of discriminatory State or local taxes runs counter to this concept. Certainly, such a situation would be contrary to the whole purpose of Congress in creating the airport and airway development program in 1970, providing, in the process, not only a uniform national plan but a national funding mechanism as well.

The trust fund is supported, as you know, by user charges of 8 percent on domestic and $3 on international flights, among others, and these will yield approximately $695 million this fiscal year from air travelers. Now, in addition to this, air travelers are being increasingly exposed to State or local head taxes, as a result of the U. S. Supreme Court's April 19, 1972, decision, of which you are well aware.

The airlines continue to believe that it is neither equitable nor necessary to expose air travelers to undue, additional burdens of taxation, and urge you to again report legislation which prohibits State or local head taxes.

When I appeared before you last year on June 19, eight State and local taxes had been enacted. Now there are over forty such taxes and many more States and localities have indicated that they intend to exploit this new source of revenue, some for purposes other than airport improvements. We have been advised that head-tax measures to offset a major portion of a general fund deficit of $200 million for 1975 are being proposed in another State. A bill requiring the airlines to collect $5.50 for each deplaning passenger has been introduced as the first step in this effort.

Philadelphia, of course, provides the most extreme example of a head tax which has actually been enacted. Although that city's original $2 enplaning and $2 deplaning charge has been changed to a $3 departure charge, the revenues still are to go to a general fund and are not earmarked for airport improvement. For a Philadelphia to Washington coach passenger, this $3 charge adds 14 percent to the price of his ticket and since he also pays an 8 percent Federal tax, that means he is paying a total of 22 percent. This particular imposition illustrates the burden such a local tax can place on the air passenger. Certainly this head tax is not only inequitable, but a distortion of the of the Supreme Court's decision as well. In the latter instance, the courts offer a pos- [p. 98] sible ultimate avenue of relief, but in the instance where a head tax may be legal, but inequitable and unduly burdensome, the Congress is the air traveler's court of last resort. The U. S. Supreme Court invited your action, as you recall, by concluding in its decision that "• • • at least until Congress chooses to enact a nationwide rule, the power will not be denied to the States." We urge you to take action now, to prohibit this kind of direct and indirect discriminatory taxation of air travelers and air commerce.

Particularly dangerous, burdensome, and discriminatory in our judgment is one State's imposition of a tax on the gross receipts derived from the sale of interstate air transportation—a so-called airlines excise tax. This tax is levied at a rate of 4 percent on airline receipts in that State "for the privilege of engaging in the business of transporting persons or property by air." The revenue derived from this tax is used for projects totally unrelated to aviation. Furthermore, it is levied only on airlines. Airlines pay all other taxes generally applicable to business in the State, and yet they and their passengers are being singled out as an easy source of revenue, whether or not airline operations in the State are profitable, and regardless of their general tax burden. Thus, Pandora's box has been opened to another form of discriminatory taxation on air transportation which, if allowed to proliferate in a myriad of possible forms, could deal a severe financial blow to air travelers as well as the airlines.

I assure you that this is no illusory fear. Already, in another State, legislation has been introduced to levy a 15-percent gross receipts tax on airline passenger ticket sales within the State, in addition to other general business taxes which airlines already pay, and the money is to underwrite general welfare programs, not airport improvements. Although we recognize that the introduction of such a bill is not tantamount to enactment, we do believe it provides a tangible and extreme example of the way in which this form of tax can get out of hand.

If adopted in all 50 States, the projected cost of a 4-percent imposition would be $92 to $300 million annually, depending on the formula used, or it could be even higher, of course, if a higher percentage were levied. The $300 million figure is more than the industry made in 1971 and 1972 combined. Obviously, the airlines could not absorb the cost of such widespread gross receipts taxes as merely another operating cost, and it would have to be reflected in the fare structure. In this event, a 2.5-percent fare increase would have to be borne by air travelers, a step that none of us, I'm sure, wishes to see ultimately when, in fact, it can be avoided.

Let me pause a moment here, to discuss this Ohio gross receipts tax a little further.

We understand, from looking at the roster of witnesses that will be before the committee, that among them will be one of the tax officials of the State of Ohio, and we have no doubt that as he appears he will attempt to justify this very heavy and discriminatory tax on airlines, on the grounds that the airlines do not pay enough taxes to the State of Ohio.

Let me answer in advance by saying this: The airlines pay all the taxes that other business enterprises pay in the State of Ohio. We are [p. 99] taxed in the same fashion as others. This gross receipts tax is an additional and very special burden imposed by Ohio.

The proceeds of this tax goes to the widows and orphans of firemen and policemen—their pension funds.

As far as we are concerned, we will join with other taxpayers in the State of Ohio to provide for the restoration of that now bankrupt fund to meet this laudable need, but we do not want to be singled out as one industry in that State to provide for this particular State's obligations. That is our point with respect to this particular gross receipts tax.

A more important point, possibly a more basic point, is the discriminatory character of such taxes. Of course, a common characteristic of this tax and the head tax is their discriminatory nature. Either tax, if enacted throughout the country would impose additional financial burdens on air travelers, who are already paying Federal taxes which were established when it was widely assumed that such State and local taxes could not be constitutionally imposed. Both seem to be convenient vehicles for unwarranted taxation of air travelers and air commerce for nonaviation purposes, or for projects which do not necessarily benefit the airports where users are taxed. These taxes can easily be escalated, and if allowed to go unchecked, pose a hazard of disrupting the national system ultimately. The best way to avoid this is to prohibit these taxes again, as you did in the bill which you passed last session. No State or locality which would seek to levy these taxes for nonaviation purposes has a legitimate claim to them. In those cases where communities are relying on head taxes to provide the revenue needed to fund airport improvements, it should not be necessary since as you recognized last year, the airport program can be adjusted to make the user charge revenues in the trust fund more available to the communities who need assistance.

Last year, as you recall, the airlines stressed the need to make fundamental changes in the airport development air program, not only to offset any revenue loss to communities from prohibition of head tax, but more importantly, to accelerate the capital improvements which will be needed to accommodate the projected needs of 325 million passengers by 1980 and nearly 500 million by 1985. It was also brought out that progress toward this goal has

been stifled by the inability of many communities to provide the necessary matching funds for airport grants. So far as we are able to determine, millions of dollars in badly needed projects are being withheld because of this difficulty.

The table inserted in my testimony here, indicates the downward trend in the value of project requests for Federal aid. I will not repeat those figures. The downward trend is obvious and rather striking.

	Number of projects	Dollar value (millions)
Fiscal year—		
1971	719	$573.3
1972	516	392.5
1973 (through Mar. 2)	407	166.0

[p. 100] Our observations indicate that much of the fall off in the value of requests for aid is related to the financing of matching funds. Smaller, less expensive projects are being undertaken; major projects are being delayed. The slowness with which airport sponsors are signing grant agreements is a further indication of the matching fund problem. As of January, fiscal year 1973, FAA had allocated funds totaling $149 million to airport sponsors, however, grant agreements had been completed on only $59.5 million. Many of the grant agreements that have been consummated recently are for fencing and fire, crash and rescue vehicles for the certification program.

Last year, we expressed the view that the best way to assure sustained development of the Nation's airports was to modify the airport program in the following ways:

First, change the 50-50 percent matching fund ratio for grants for all airports to 90-10 percent, as the Highway Trust Fund has done with the interstate highway system.

Second, make public areas of passenger terminals eligible for Federal funding, since this is the area which will be hardest hit by the burgeoning growth in air travel.

Third, provide funding for the capital costs of the Government-required airport security and certification programs.

The bill which was ultimately passed by the Congress prohibited gross receipts and head taxes, provided 82 percent Federal funding for the security and airport certification program, and established a 75-25 percent matching ratio for airports other than the 22 major hubs.

For the latter, the matching ratio remained at 50-50.

While we were disappointed that the bill did not follow the highway precedent and provide for a 90-10 percent matching ratio for all air carrier airports and did not establish eligibility for the public areas of passenger terminals, we did feel that Congress had tackled and solved the most immediate problems. It was a good bill. However, the President concluded that a provision of the bill which increased the minimum expenditure limit for the airport program from $280 million to $350 million was an excessive expenditure for this purpose and vetoed the legislation, explaining his action as follows:

And I quote from the veto message:

This bill would increase Federal expenditures and raise percentage participation in categorical grant programs with specific and limited purposes. I believe this would be inconsistent with sound fiscal policy. Airport development funds have been almost quadrupled since 1970 under this administration.

The airlines are still convinced of the great urgency of taking action on the issues that the Congress dealt with in the last year's legislation. As we have already pointed out, the enactment of head taxes by cities has increased greatly in recent months and we have every reason to believe that that movement will continue.

Cities are still being hampered in the achievement of airport improvements by the 50 percent matching grant

provision. The airport improvements designed to provide additional security should have a very high priority and the improvements necessary to achieve legally required certification must move forward rapidly.

In communications to the Congress, the Department of Transportation has suggested that all airport changes be delayed until the Congress has received and had an opportunity to review the cost [p. 101] allocation study, the National Airport System plan and the report of the Aviation Advisory Commission. We do believe that these studies are important and will inevitably provide a basis for a thorough examination of the entire airport and airways program. We look forward to this reexamination because we would hope that we can present again to the Congress, hopefully in a more convincing way, our desire to provide for an improved matching grant ratio for all airports and our belief that the public areas of terminal buildings should be made eligible for Federal airport aid on a 50-50 basis.

However, for all the reason we have stated, we do not believe that the problems dealt with by last year's bill can be postponed for the length of time required for a congressional review of these studies. Accordingly, we hope that you will promptly report a bill similar to that which was vetoed last year, although perhaps with a lower required expenditure level. The current requirement of $280 million annually is after all, a floor, not a ceiling, and the amount can be adjusted upward by the Appropriations Committee.

In addition, the review of the airport and airways program which follows submission of the DOT studies will provide an opportunity to further explore this problem. For these reasons, we do not consider it absolutely essential that the mandatory minimum spending level be increased at this time. The delegation of such a requirement in the legislation you are now considering should assure its enactment without undue delay since it would remove the President's stated objection to the measure.

That concludes my statement, Mr. Chairman, I will be glad to try to answer any questions.

Mr. Jarman. Thank you, Mr. Tipton, I think it is an excellent statement.

At this time, before we get into questions and answers, I would like to introduce Mr. Edward J. Driscoll, National Air Carrier Association, who is listed as one of our three witnesses this morning, and who has asked to be recognized to insert a statement in the record.

. . . .

[p. 246] STATEMENT OF THEODORE KOETZ, DEPUTY TAX COMMISSIONER, STATE OF OHIO; ACCOMPANIED BY DONALD SWEPSON, COUNSEL

Mr. Koetz. Yes. My name is Theodore Koetz. I am Deputy Tax Commissioner of the State of Ohio. And this is Mr. Donald Swepson of our legal staff.

Mr. Jarman. Mr. Koetz, you may proceed in the manner you desire with your testimony.

Mr. Koetz. Mr. Chairman and honorable members of the Interstate and Foreign Commerce Committee:

As Deputy Tax Commissioner of the State of Ohio, I appreciate this opportunity to appear before you in your deliberations on three pieces of legislation concerning airports, airways, and airlines, S. 38, H. R. 2695, and H. R. 4082.

Although these bills deal with several subjects, the interest and concern that we in Ohio have in these bills are the portions titled "State Taxation of Air Commerce."

Mr. Jarman, Mr. Koetz, if you will, you may submit this statement for the record and then just emphasize the highlights that you think this committee should consider. We would appreciate that.

Mr. Koetz. Right.

Mr. Chairman, basically we have an airlines excise tax in Ohio which is unique, and we are probably the only State in the 50 States that has such a tax. It is based on 4 percent of the gross receipts of an airline—passengers and also freight—that is apportionable to Ohio.

We feel that as to the head taxes basically we have no objection to the head taxes or the prohibition against the head taxes in the various cities, but we feel that the airline excise tax, which we passed in 1969, is a fair and equitable tax based upon the overall burden that the airlines are bearing in the State of Ohio, compared to other utilities.

For example, the railroads and other transportation, such as trucking companies.

Our contention is that some of the language in the bill, in the Senate bill right now would prohibit Ohio's airline excise tax. And we would like to suggest legislation or an amendment that would basically let us maintain our airlines excise tax.

Though it is not a big revenue-producer for the State of Ohio—it brings in approximately $2 million in Ohio—we feel that the intention or possibly the intention of the bill, was to eliminate the head taxes—the primary thrust of the bill. And we just want to bring to the committee's attention the fact that this would eliminate an airline excise tax in Ohio.

I would entertain any questions on the presentation.

[Mr. Koetz' prepared statement follows:]

Statement of Theodore Koetz, Deputy Tax Commissioner of Ohio

Mr. Chairman, honorable members of the Interstate and Foreign Commerce Committee, as Deputy Tax Commissioner of the State of Ohio, I appreciate this opportunity to appear before you in your deliberations on three pieces of legislation concerning airports, airways, and airlines, S. B. 38, H. R. 2695, and H. R. 4082.

Although these bills deal with several subjects, the interest and concern that we in Ohio have in these bills are the portions titled "State Taxation of Air Commerce". For convenience in referring to the text of the bills, I will refer to [p. 247] S. 38, since the pertinent language is similar in all three bills, and S. 38 has passed the Senate. The state taxation portion of S. 38 begins at line 11 on page 6, and continues through line 9 of page 8.

The specific language which concerns us is contained in lines 12 through 20 on page 6:

"Section 1113. (a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom."

This language first came to our attention with the introduction of S. 3755 in the Second Session of the 92d Congress. Prior to and at the time of its introduction the newspapers and magazines, general and specialized, reported that legislation would be or had been introduced to prohibit the rising trend of the imposition of local "head taxes" at airports across the nation. The thrust of the legislation, as reflected in the reports and publicity, was to the type of per capita charges on air travelers or "head taxes", as had been enacted and imposed in the State of New Hampshire; Evansville, Indiana; Philadelphia; and ten or so other cities. That the object of the legislation was the so-called "head taxes" is reflected in articles in National Journal (July 29, 1972, p. 1222), Congressional Quarterly (December 23, 1972, p. 3193), and in comments by Chairman Staggers in response to inquiries by Mr. Matsunaga contained in the House Congressional Record (August 18, 1972, p. H 8003).

However, upon obtaining the bill and reading the state tax prohibition provisions in S. 3755 (which is identical in S. 38, in the pertinent portions) we found that the prohibition of state taxes was much broader and all-inclusive

than the various articles and reports indicated. The prohibition would encompass "a tax * * * directly or indirectly, * * * on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom".

Our particular concern in Ohio is that this language, although not the stated or understood intent, would apparently render null and void the Ohio airlines excise tax.

In 1969, the Ohio General Assembly enacted the airlines excise tax, which is contained in Chapter 5745, Ohio Revised Code, effective August 18, 1969.

The tax has been the subject of litigation as to its propriety and constitutionality. The legislation has been upheld by the Ohio Board of Tax Appeals (*United Air Lines Inc. v. Porterfield, Tax Commissioner,* B. T. A. #70-05-1397, February 5, 1971), the Ohio Supreme Court (*United Air Lines v. Porterfield* [1971] 28 Ohio St. 2d 97), and the United States Supreme Court which dismissed the appeal for want of a substantial federal question, June 19, 1972 (*United Air Lines Inc. v. Porterfield,* 92 S. Ct. 2461).

The basis of the tax is relatively simple. The Statute (Sec. 5745.02, Ohio Revised Code) provides:

"* * * An excise tax is hereby imposed upon the privilege of engaging in the business of transporting persons or property by air within this state. The tax is as follows:

(A) Four per cent of the receipts derived from transportation which begins and ends within the state;

(B) Where the transportation does not begin and end within this state, four per cent of the receipts derived therefrom attributable to business carried on within this state based on the proportion of the mileage within the state to the entire mileage over which the persons or property are transported, into or out of the state.

All moneys received in the state treasury * * * shall be deposited to the credit of the general revenue fund."

The fact that this tax is not excessive or burdensome to the airlines is seen from the way that airlines are treated within the overall Ohio tax structure, and from the total liabilities of the airlines for this tax.

The Ohio tax structure may be unique in reference to airlines. Most businesses in Ohio, be they domestic or foreign, intrastate or multistate, are amenable to a franchise tax and a personal property tax, the latter either in the form of the general personal property tax or the public utility ad valorem tax. However, the airlines are fully subject only to the corporate franchise tax. They are exempted from the public utility ad valorem tax because, unlike the railroads, they are not classified as public utilities. Although they do pay the personal property tax, it is far from a burdensome levy because their major investment is personal property, [p. 248] aircraft, is not subject to the Ohio personal property tax. In addition, commercial planes are exempt from Ohio sales tax, aviation gasoline is exempt from motor fuel tax, and pet fuel is exempt from both motor fuel tax and sales tax. Also, of course, public airports are exempt from real property taxes.

Thus, while railroads pay over $30 million in total taxes to the state of Ohio, and the trucking industry pays well over $100 million, all aviation has an Ohio tax burden slightly over $3 million, including the airlines excise tax.

A completely clear picture of the actual tax liability and revenue from the Ohio airlines excise tax has not yet emerged. Litigation on the measure just ended in June, 1972, and there are some individual questions and problems being resolved; payment of the tax need not be made while an assessment is under review or litigation. However, total revenue from the tax is estimated to be about $2 million per annum.

Although we cannot divulge the specifics on individual taxpayers because of confidentiality statutes in our state

law, we have about 135 taxpayers filing the airlines excise tax reports. A dozen of those are major airlines and the others are fixed-base operators or organizations performing aerial services subject to the tax. The average liability of the major air carriers, which represent well over 90% of total collections under the excise tax, is estimated to be about $35,000 quarterly, or $140,000 annually.

I would, therefore, recommend to and request of this Committee that any legislation prohibiting the state's rights to tax air carriers be so drafted so as not to include in the prohibition the Ohio airlines excise tax.

I make this request for the State of Ohio on the basis that our tax is fair, reasonable, and necessary, and that it is not a tax of the type that has given rise and impetus to this legislation, the so-called "head taxes". The State of Ohio does not have airport "head taxes", nor, to my knowledge, does any local subdivision of the state. I believe that the Ohio airlines excise tax is similar to the types of taxes permitted by S. 38, lines 7 through 22 on page 7, but would be prohibited under the language of the bill as it now exists.

We have specific language suggestions, and would be happy to discuss this with the Committee or its technical advisors if you so desire.

Mr. Jarman. What other States, if any, have this kind of excise tax?

Mr. Koetz. None. To my knowledge, there are none, Mr. Chairman.

Mr. Jarman. What amount of money is raised in Ohio from this?

Mr. Koetz. Approximately $2 million a year.

Mr. Jarman. Of course, this committee, and you, realizes that there is real concern in the airline industry over this type of tax, and the danger as the airlines view it is that this approach will expand into other parts of the country.

So I think it is of particular interest to the subcommittee to have some direct testimony from you on this.

The Chair has no further questions at this time.

Mr. Dingell?

Mr. Dingell. Thank you, Mr. Chairman.

You have indicated that you have some suggested amendatory language for the committee. Would you see that it is submitted to the counsel so that we can have it for the record?

[The following proposed language was received for the record:]

State Taxation of Air Commerce (Proposed Language)

Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge on persons travelling in air commerce or on the act of transporting persons in air commerce: Provided, however, That any State or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied and collected a tax, fee, head [p. 249] charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

(b) Nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy

or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net incomes taxes, franchise taxes, sales or use taxes on the sale of goods or services, privilege or excise taxes, and gross receipts taxes fairly apportioned to a State; and nothing herein shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting, without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until July 1, 1973.

Mr. Dingell. You have no head taxes in the State of Ohio?

Mr. Koetz. None.

Mr. Dingell. Your appearance here this morning is limited to the presentation of your excise tax?

Mr. Koetz. Yes, sir.

Mr. Dingell. This is a rather novel form of excise tax. In my memory, excise taxes have always been related to sales or transactions. This excise goes to any freight or passenger or moving in commerce across Ohio, whether

the aircraft actually touches the State's surface or not; am I correct?

Mr. Koetz. No, sir. This only applies where there is some contact or nexus with Ohio. In other words, they make a landing and passengers get on or get off. It is not on flights going over the State of Ohio. We do not tax any overflights.

Mr. Dingell. I travel between here and Michigan. And, assuming I were to go there and the craft were to land at Cleveland or Youngstown airports between here and Detroit, would I be subject to that tax?

Mr. Koetz. No—if you did not get off the plane there. Otherwise: Yes, you would be. Not you directly, the airline.

Mr. Dingell. Suppose I got off to stretch my legs, to get a cup of coffee or go to the restroom?

Mr. Koetz. No, sir.

Mr. Dingell. I would not be subject to the tax?

Mr. Koetz. No.

Mr. Dingell. Only if I were to, say, get off the aircraft and end my trip in Ohio?

Mr. Koetz. That is correct. If you were originating or if that were your destination.

Mr. Dingell. Suppose this were part of the continuing trip. I would get off because of bad weather and go on to Detroit. Would I be subject to the tax?

[p. 250] Mr. Koetz. No, sir.

Mr. Dingell. Suppose I were to, let's say, have a ride with a friend and ride by car to Cleveland and we would get on at Cleveland and take an aircraft to Washington. Would I be subject?

Mr. Koetz. You would be.

Mr. Dingell. This is not a gross receipts tax. You are not talking about a gross receipts tax?

Mr. Koetz. No. Our receipts are primarily limited to just that that we can apportion to Ohio.

Mr. Dingell. You don't have a fuel tax on aircraft?

Mr. Koetz. No, sir.

Mr. Dingell. Why not? I am curious to know. That would not be banned by the legislation.

Mr. Koetz. No; that is correct, because the legislature just has not seen fit to pass it.

Mr. Dingell. A matter of policy.

Mr. Koetz. Right.

Mr. Dingell. Was there any underlying reason for the policy? Oftentimes when a legislature acts they have some underlying reason for what they did.

Mr. Koetz. I don't know of any underlying policy for that.

Mr. Dingell. How long has this been in process?

Mr. Koetz. Since 1969.

Mr. Shoup. If I were to get on a plane in Cleveland wherever my destination would be, the airline would be charged a certain fee. Is this correct?

It would be identical no matter where my destination is, because I would be over Ohio only a certain amount of time.

Mr. Koetz. That is correct. In other words, there would be a measurement taken by the number of miles that you have flown on your trip in Ohio as compared to your total miles.

In other words, if you were flying to Hawaii it would only be about 200 miles. That ratio would be applied to, say, 3000 miles that we could not touch, say, or could not apportion to Ohio.

Mr. Shoup. The airline would pay that?

Mr. Koetz. That is correct.

Mr. Shoup. I would ask you, Is there much difference between that and a head tax?

Mr. Koetz. Yes. We feel that there is a difference between that and a head tax. In other words, we are not necessarily charging the passengers directly for the tax, you know, boarding the plane or deplaning or anything like that. This tax is charged directly to the airlines.

Mr. Shoup. I think the problem we have here on the committee on the head tax is not the fact that revenues being raised for a very needed use, but the fact that we made these decisions some years ago that we would take a national view of it, not individual.

And it would seem to me that this type of tax does not differ from a head tax; that each State and each community, if we can justify Ohio's, would be able to add their own excise tax, which I can't see differs from a head tax.

Mr. Koetz. That is possibly true. What we would like to suggest is that possibly, since Ohio has already enacted this act, amendments be [p. 251] made that would allow the Ohio airline excise tax, but no expansion of any other State in the same area.

Mr. Dingell. Would the gentleman yield?

Mr. Shoup. I will yield on that; yes.

Mr. Dingell. That is for Ohio, but don't let anybody else do it?

Mr. Koetz. We are making the suggestion.

Mr. Dingell. Are you making it seriously?

Mr. Koetz. Yes.

Mr. Dingell. It is a rather curious suggestion.

Mr. Shoup. Somewhat selfish, too.

Mr. Koetz. But that is one of the fears of the airlines, of this being expanded to the other 49 States. No doubt about that.

Mr. Shoup. If this, you feel, is a fair tax and is supplying Ohio with needed revenue, then would you suggest that the committee take a look at this as a possible policy or legislation which would involve all 50 States?

Mr. Koetz. Yes. We have had a court test on this. It went to the U. S. Supreme Court, on the fairness and the equitable features in the tax and it has been upheld. It has been a long, continuing battle in Ohio to get this thing started and we have spent much time and effort in fighting defenses in court and things like that for the last 2 years. And we finally have resolved those problems in the courts. And now we are collecting the tax.

In other words, we are going in the direction, I would say.

Mr. Shoup. What is the control or use to which these taxes can be put? Do these go into the general fund?

Mr. Koetz. They go into the general revenue fund, but they are specifically earmarked for the widows and orphans and firemen and police pension funds.

Mr. Shoup. There is a similarity, then, to the Philadelphia case is it not, where the mayor said they were using it for retirement funds, for payment of wages?

Mr. Koetz. I am not sure of that.

Mr. Shoup. Theirs is a head tax.

That leads me to say that it appears as though this tax is approaching more and more a similarity to a head tax.

I think our problem in these bills is to find a way to assist local communities in finding an equitable means of financing their share of the operating costs. You tax the airlines to provide for retirement or widows and orphans of firemen and policemen; is that correct?

Mr. Koetz. That is correct.

Mr. Dixon. Wasn't the court resolution by a 4 to 3 decision?

Mr. Koetz. That is correct, 4 to 3.

Mr. Dixon. Will you call it a close question?

Mr. Koetz. Yes.

Mr. Shoup. Would you feel that the most recent court decision which stated specifically what head taxes could be used for, will have any effect on the decision that you have for Ohio?

Mr. Koetz. Not if we can make a distinction between our airlines' excise tax and the head tax.

Mr. Shoup. One final question, Mr. Chairman.

[p. 252] I was interested in your answer to Mr. Dingell's question, whether this was a gross receipts tax. I fail to understand why this is not a gross receipts tax.

Mr. Koetz. Well, we start off with the total gross receipts of the airline and then break them down only to the in and out of Ohio's portion.

Mr. Shoup. But it is based on the gross receipts?

Mr. Koetz. It is based on the gross receipts attributable to Ohio, origination-destination.

Mr. Dingell. If the gentleman will yield: then it is a gross receipts tax. It either is an excise tax or it is a gross receipts tax. And I do not think calling it an excise tax is going to make it; so, to be perfectly frank with you. This is either an excise tax or a gross receipts tax.

So really, you have a gross receipts tax, and the only difference between this and a regular gross receipts tax, for example, on an airline doing business, would be that you would simply say: "OK fellows, we are only going to charge you on that portion of the business which is done inside the State of Ohio."

But the Federal Constitution would prohibit you from levying a tax on business that is done outside the State of Ohio anyway.

Mr. Koetz. That is correct. We do have a gross receipts tax on railroads in Ohio, doing business in Ohio, too, and have had for several years.

Mr. Dingell. I thank my friend.

Mr. Shoup. I have no further questions, Mr. Chairman.

Mr. Jarman. Do I understand from your testimony that none of the revenue from this tax goes for aviation purposes?

Mr. Koetz. That is correct.

Mr. Jarman. Mr. Metcalfe.

Mr. Metcalfe. Thank you, Mr. Chairman.

I just need some clarification. When Congressman Dingell was asking the question and giving the examples of stopping over, or whether or not he terminated his trip in Ohio, you gave us a very definitive answer.

If he was terminated, of course, the tax would apply; but if he got off to stretch his legs it would not apply.

Then when Congressman Shoup asked the question: "A plane was flying over Ohio," as I understood it, "and was going to Hawaii;" did I hear you correctly that you would charge a portion of the amount of the tax?

Mr. Koetz. No; if a plane were just flying over Ohio we would have no nexus. There has to be some connection with Ohio. The passenger has to originate in Ohio, or his destination has to be Ohio.

But a plane, say, flying from New York over Ohio, going to Hawaii—there is absolutely no tax consequence there.

Mr. Metcalfe. Since the approximately $2 million that you collect every year is going for the benefit of widows and orphans of firemen and police, what source of revenue do you have to improve the facilities?

Or, assuming that you wanted to build a new runway or to pay for the new program of preventing air piracy, in order to establish [p. 253] security? What funds do you have for that, and where do you get those?

Mr. Koetz. Basically, those funds would be user fees that would be charged by the local airports, you know, for expansion. It would be between the airlines and the local airports. Revenue would be raised in that manner.

Mr. Metcalfe. So therefore there would be really two taxes inflicted? Is that right? The tax for that purpose of improving facilities of the airport, as well as for hiring personnel for security purposes to prevent air hijacking.

Mr. Koetz. I am not sure how the local airports are paying for the security, but I assume that it is coming out of the funds, whatever they are charging the various airlines in fees, landing fees, user fees.

Mr. Metcalfe. So, what is the difference between what they are charging the airlines for user fees, landing and the $2 million that is going into the orphans and widows fund, and the amount of money for the other that I mentioned?

Mr. Koetz. Well, the basic difference, as I see it, would be the specific use of that particular airport in landing and taking off; and there is a fee charged for each incident.

Mr. Metcalfe. Then I must include in that that a passenger is subject to two taxes: The excise tax as well as the other tax, in order to meet his expenses?

Mr. Koetz. Indirectly; yes.

Mr. Metcalfe. I have no further questions, Mr. Chairman.

Mr. Shoup. To summarize your testimony, then, you are not speaking on behalf of air travel or aviation. Your testimony is basically on what? Compassion for the widow and orphan in Ohio?

Mr. Koetz. Yes.

Mr. Metcalfe. Are there any other sources of funds for the widows and orphans of policemen and firemen in the State of Ohio?

Mr. Koetz. There are, out of each paycheck, out of the firemen and policemen in Ohio—the firemen or policemen contribute so much to the retirement pension fund and then the State makes a matching contribution.

In other words, most of the revenue is derived from that source.

Mr. Metcalfe. When you say the State makes an additional contribution, is that the money that we are talking about, as to excise tax, or would that be a separate fund?

Mr. Koetz. That would be a separate fund.

Mr. Jarman. If there are no further questions, we appreciate your being with us, gentlemen, to help complete the hearing record.

Mr. Koetz. Thank you, Mr. Chairman.

Mr. Jarman. The next witness this morning is Mr. John A. Nammack, executive vice president of the National Association of State Aviation Officials, with offices here in Washington.

[p. 259] . . . .

Statement of John A. Nammack, Executive Vice President, National Association of State Aviation Officials

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[p. 260] . . . .

THE HEAD TAX ISSUE

In testimony before this Committee last year, NASAO stated its opposition to proposed Congressional action which would impose a blanket prohibition on the right of

the states and local authorities to assess and collect passenger service fees or "head taxes" on passengers enplaning at airports under their jurisdiction. At the same time, we recognized that such taxes should be reasonable and preferably uniform, and that the proceeds should be used for airport development purposes.

The states reiterate that position as a matter of principle more than as a basis of intended practice. It is worth noting that no state has passed "head tax" legislation since the Supreme Court handed down its decision in the Evansville New Hampshire case. The states did not take that decision as a green light to begin moving into passenger service charges. In fact, only one state made any attempt—and it was exploratory in nature—to pursue the possibility of imposing such fees, and as Mr. Dingell accurately stated during last week's hearings, the state's intention was to apply the revenue it collected to the development of airports included in the State airport system as well as to the further development of the airports where the charges were collected.

The chairman of the Air Transport Association last week alluded to legislation recently introduced in two states which would levy a 15% gross receipts tax on airline passenger ticket sales within one state and which would impose a 4% airlines excise tax on the carriers' gross receipts from ticket sales in the second state. It may interest this Committee to learn that in the first state, which is Oklahoma, the bill is being actively opposed by the Oklahoma Aeronautics Commission which learned about the legislation only last week. The second state was Hawaii, which happens to be one of only three states who are not presently members of NASAO. As a result, we can offer no comment on the destiny of that bill.

I can state categorically that we are aware of no other state actively pursuing "head tax" legislation at this time. Nor is it our intention to attempt to create a major obstacle with the "head tax" issue to impede the passage of the Chairman's bill which we support.

HOUSE OF REPRESENTATIVES

93d Congress
1st Session

Report
No. 93-157

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973

April 19, 1973.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Staggers, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 6388]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 6388) to amend the Airport and Airway Development Act of 1970 to increase the U. S. share of allowable project costs under such act; to amend the Federal Aviation Act of 1958 to prohibit certain State taxation of persons in air commerce; and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments, as they appear in the reported bill, are as follows:

(1) Page 2, immediately after line 5, insert the following:

"Sec. 3. Section 14 (b) of the Airport and Airway Development Act of 1970 (49 U. S. C. 1714 (b)) is amended—

"(1) by striking out "$840,000,000" in the first sentence thereof and inserting in lieu thereof "$1,400,000,000"; and

"(2) by striking out 'hand' in the last sentence thereof and inserting immediately before the period ', an aggregate amount exceeding $1,120,000,000 prior to June 30, 1974, and an aggregate amount exceeding $1,400,000,000 prior to June 30, 1975'."

(2) Page 2, line 17, strike out "Sec. 3." and insert in lieu thereof "Sec. 4.".

(3) Page 2, line 21, strike out "Sec. 4." and insert in lieu thereof "Sec. 5.".

(4) Page 3, strike out lines 6 through 13 and insert in lieu thereof the following:

"(1) 50 per centum for the sponsor of any airport which enplanes not less than 1 per centum of the total annual passengers enplaned by air carriers certificated by the Civil Aeronautics Board; and

[p. 2] "(2) 75 per centum for the sponsor of any airport which enplanes less than 1 per centum of the total annual passengers enplaned by air carriers certificated by the Civil Aeronautics Board"; and

(5) Page 4, line 16, strike out "Sec. 5." and insert in lieu thereof "Sec. 6.".

(6) Page 4, line 20, strike out "Sec. 6." and insert in lieu thereof "Sec. 7.".

(7) Page 5, lines 17 and 18, strike out "July 1, 1973." and insert in lieu thereof "December 31, 1973.".

(8) Page 6, line 22, strike out "July 1, 1973" and insert in lieu thereof "December 31, 1973".

COMMITTEE AMENDMENTS

. . . .

Third, committee amendments numbered (7) and (8) extend from July 1, 1973, to December 31, 1973, the period of time within which certain State or local taxing authorities which have been levying and collecting airline passen-

ger head taxes will be exempt from the prohibition against such taxes provided by the reported bill.

The remainder of the committee amendments merely make technical changes in the section numbers of the reported bill to reflect the addition of the new section 3.

PURPOSE

H. R. 6388 amends the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958 in order to increase federal financial assistance for airport development throughout the United States. It also prohibits the levying and collecting, by State and local governments, of passenger use taxes ("head taxes") on persons traveling in air commerce or on the sale of air transportation.

The legislation to provide increased U. S. participation in airport development grants is required because of the serious financial difficulties being experienced by many local governmental agencies who bear [p. 3] the responsibility to build, operate, and maintain the Nation's system of publicly owned airports. The increased share of Federal funds provided by the legislation will come from the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970, and since all such funds come from revenues from user taxes on aviation system users, no new expenditures of general Federal funds will be required as a result of this legislation.

H. R. 6388 prohibits the so-called "head tax" by any governmental agency other than the United States, on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate by the Federal Government, and will not be subject to the various user taxes being levied in a number of jurisdictions across the country.

HEARINGS

The Subcommittee on Transportation and Aeronautics held hearings on H. R. 4082, H. R. 2695, H. R. 627,

H. R. 1784, H. R. 4182, H. R. 4213, H. R. 4214, and S. 38 on March 14, 15, 20, 22, and 27, 1973.

Witnesses representing virtually all segments of air transportation and the federal agencies which regulate the Nation's air system testified. The Subcommittee was afforded a wide range of contrasting views on the major provisions of the legislation, including the head tax provision and legislation increasing expenditures from the Trust Fund for airport development.

COMMITTEE ACTION

On March 28, 1973, the Subcommittee on Transportation and Aeronautics considered the various legislative proposals included in the hearing record and decided to report a clean bill, H. R. 6388, which utilized the language of H. R. 4082, but amended it to reduce the minimum annual authorizations for each of the fiscal years 1974 and 1975 from $350 million to $280 million. The Subcommittee action was unanimous.

On April 11, 1973, the Committee on Interstate and Foreign Commerce considered H. R. 6388 and reported favorably by voice vote with seven amendments.

BACKGROUND AND NEED

The 91st Congress, in response to sharply increasing airport and airspace congestion, created a federal aviation trust fund (Airport and Airway Revenue Act of 1970), in order to increase Federal participation in the expansion, development and modernization of public airports throughout the nation. The primary money resources for the fund is derived from an 8 percent excise tax on domestic tickets.

Prior to 1970, Federal participation in airport construction, maintenance and development was severely handicapped by budgetary restrictions, since funds were appropriated entirely from general revenues. This situation resulted in the Federal Government turning down

or postponing local and State programs even where the local or State funding was provided for because the Federal share was not available.

[p. 4] Three years after passage of the Act the situation has changed dramatically in many locations. Many State and local government agencies are hard pressed to raise their share of the funds required to match the Federal project grant.

More than forty State and local governmental agencies have enacted a passenger user tax, the so-called "head tax", in an effort to generate new revenue. On April 19, 1972, the $1.00 "use and service charge" levied by the airport authority in Evansville, Indiana, and the $1.00 per passenger service charge on passengers enplaning at New Hampshire's five publicly owned airports (for aircraft of 12,500 lbs. or less, the charge is 50 cents per passenger) were upheld by the U. S. Supreme Court [Table listing forty-four jurisdictions with head taxes is omitted.]

Congress never intended for local and State agencies to raise money for airports by the use of such taxes. The Committee feels that the head tax is an unnecessary burden on interstate commerce, that it is discriminatory, and that it has a stifling affect on air transportation.

During the second session of the 92d Congress, this Committee considered in depth the related problem of the inability of many local and State governmental units to raise the necessary resources to match Federal grants for airport improvement projects, as well as the problem created by the so-called head tax.

[p. 5] At the time these matters were being considered, only seventeen jurisdictions had enacted the passenger user taxes in 1972. Testimony presented to the Subcommittee on Transportation and Aeronautics during the March 1973 hearings indicated that the number of jurisdictions levying the head tax had mushroomed to 44.

The Committee believes the burgeoning numbers of localities using the head tax as a means of raising revenue

necessitates an immediate and clear action on the part of Congress if it is to maintain the integrity of air transportation in the United States. The Committee rejected the proposals for a moratorium on such passenger fees, and believes, in light of the U. S. Supreme Court decision on April 19, 1972 (*Evansville-Vanderburgh Airport Authority District, et al. v. Delta Airlines, Inc., et al; Northeast Airlines, Inc., et al v. New Hampshire Aeronautics Commission, et al.*), that a complete and permanent prohibition of such taxes must be statutory.

This Committee reported legislation (H. R. 14847) on July 26, 1972 which would have authorized the Civil Aeronautics Board to conduct a one-year study to determine the financial needs at airports which are funded in whole or in part at a State or local level. In order to give the Congress time to review such investigation and 18-month moratorium on the so-called head taxes was passed. The House passed H. R. 14847 with amendments on August 18, 1972.

The Senate Commerce Committee reported a different measure on August 1, 1972, and it passed the Senate on August 10, 1972. (S. 3755).

The conferees met and agreed to a compromise in October 1972.

The President pocket vetoed the legislation on October 27, 1972.

The legislation which this Committee has approved (H. R. 6388) is essentially the same bill as S. 3755), which both the House and Senate agreed to late last year.

The major difference between S. 3755 and H. R. 6388 is that the minimum annual authorization has not been increased in H. R. 6388. The Committee merely extends for fiscal years 1974 and 1975 the minimum annual authorization at the same level as in the first three fiscal years covered by P. L. 91-258, i. e., $280 million.

The Committee feels that by leaving the minimum annual authorization figure at FY 1971-1972-1973 levels, it

meets the objections raised by the administration in regard to their budget plans. The Committee stresses that these monies are to be derived from the Airport and Airway Trust Fund and not the general revenues.

The Committee has also extended an exemption until December 31, 1973 for several airports using the head tax. States levying and collecting the head tax before May 21, 1970 (the date the Airport and Airway Development Act of 1970 became law) are exempt from the prohibition until December 31, 1973, as are operating authorities which have an outstanding loan for airport improvement, have collected a passenger user tax without carrier assistance and have no authority to collect any other type of tax to repay the loan.

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[p. 10]

STATE TAXATION OF AIR COMMERCE

Section 7 amends title XI of the Federal Aviation Act of 1958 by adding a new section 1113 providing for a permanent prohibition against the levy or collection of a tax or other charge on persons traveling in air commerce or on the carriage of persons so traveling or on the sale of air transportation or the gross receipts derived therefrom by any State or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, territories or possessions of the United States, or political agencies of two or more States. There are two exemptions from this prohibition. First, any State which levied and collected such charges before May 21, 1970, is exempt from the prohibition until December 31, 1973. Second, any airport operating authority which—

(1) has an outstanding obligation to repay money borrowed and expended for airport improvements,

(2) has collected, without carrier assistance, a head tax on air passengers for the use of its facilities, and

(3) has no authority to collect any other type of tax to repay the loan,

is exempt from the prohibition until December 31, 1973. The new section 1113 also provides that the prohibition does not extend to the levy or collection of other taxes, such as property taxes, net income taxes, franchise taxes, and sales or use taxes, nor to the levy or collection of other charges such as reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities. The table of contents contained in the first section of the Federal Aviation Act of 1958 is amended to reflect the addition of the new section 1113 discussed above.

119 CONG. REC. 13,896-13,911 (MAY 2, 1973).

AIRPORT DEVELOPMENT ACCELERATION OF 1973

Mr. LONG of Louisiana. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 370 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. RES. 370

Resolved, That upon the adoption of this resolution it shall be in order to move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H. R. 6388) to amend the Airport and Airway Development Act of 1970 to increase the United States share of allowable project costs under such Act; to amend the Federal Aviation Act of 1958 to prohibit certain State taxation of persons in air commerce; and for other purposes. . . . After the passage of H. R. 6388, the Committee on Interstate and Foreign Commerce shall be discharged from the further consideration of the bill S. 38, and it shall then be in order in the House to move to strike out all after the enacting clause of the said Senate bill and insert in lieu thereof the provisions contained in H. R. 6388 as passed by the House.

. . . .

Mr. LONG of Louisiana. . . .

. . . .

H. R. 6388 also prohibits the levying and collecting, by State and local governments, of passenger use taxes—commonly known as "head taxes"—on persons traveling in air commerce.

Mr. Speaker, this legislation is needed because of the serious financial difficulties now being experienced by many local governmental agencies who bear the responsi-

bility to build, operate and maintain our system of publicly owned airports. I urge the adoption of House Resolution 370 in order that we may discuss and debate H. R. 6388 (*Id.* at 13,897).

Mr. DEL CLAWSON. . . .

. . . .

The primary purposes of H. R. 6388 are to increase Federal financial assistance for airport development and to prohibit State and local governments from collecting airport head taxes on passengers.

In the 92d Congress the House passed a bill providing an 18-month moratorium on head taxes and a study of airport needs. The Senate passed a different version. The conference report was agreed to near the end of the session, and on October 27, 1972, the President vetoed the bill S. 3755 for budgetary reasons. (*Id.*).

. . . .

H. R. 6388 also provides a permanent prohibition against the levy and collection of local and State airport head taxes. However, many State and local taxing authorities which have been collecting airport head taxes will be exempt from this prohibition until December 31, 1973. (*Id.*).

. . . .

Mr. KUYKENDALL. . . .

. . . .

In the 93d Congress it was the feeling within our Subcommittee on Transportation that a bill tracking the previous bill but with an acceptable obligation figure should have the best chance of making the grade. Apparently the feeling had also grown that head taxes should be prohibited without further study.

The committee brings to you a bill which will prohibit the imposition of head taxes or gross receipts taxes by airport operators or States. There are some slight adjustments for communities which have made commitments or which started collecting taxes prior to the original congressional action. These are tailored to the specific situations and are of very short duration, ending at the end of 1973.

Recognizing the almost universal need for greater revenue if airports are to be built, and as some compensation for the loss of the potential revenue from head taxes, the bill provides an increase in the Federal share of airport projects. (*Id.* at 13,899).

. . . .

Mr. JARMAN. . . .

. . . .

Perhaps one of the most controversial aspects of the legislation last year was the feature dealing with passenger user taxes imposed by different jurisdictions across the country. When we considered this legislation last fall, only 17 jurisdictions utilized the so-called head tax. Today, there are 44 such taxes, and many other jurisdictions have planned to impose such a fee. This matter has been litigated in the courts. In April of last year, the Supreme Court of the United States upheld the constitutionality of the New Hampshire and Evansville, Ind., head taxes, stating that until Congress adopted a position on the matter, such taxes could be imposed by local jurisdictions.

The Interstate and Foreign Commerce Committee feels that the head tax is discriminatory and constitutes a burden on our national transportation system. The taxes vary from jurisdiction to jurisdiction, with no regard to the length of the journey of the passenger. The passenger is already paying an 8 percent Federal tax on his ticket in order to finance the airport and airway trust fund. (*Id.* at 13,900).

. . . .

Mr. BINGHAM. . . .

. . . .

This legislation also contains provisions that would prevent State and local governments from obtaining their matching funds for airport development through the use of "head taxes" on airline passengers. The Federal airport trust fund itself, of course, consists of proceeds from user taxes. So, in effect, this legislation endorses and perpetuates user taxes in the aviation field by the Federal Government, but prohibits them as a revenue device for State and local governments. This is an inconsistency which seems to me unfair to State and local governments. If anything, the formula should be reversed. It is the State and local governments that are hardest pressed for sources of revenue and should thus be given maximum flexibility for raising specific revenues for specific purposes. It is the Federal Government, on the other hand, that has the greater revenue-sharing capability and the responsibility for setting broad funding priorities, arguing for use of general revenues rather than earmarked user taxes for Federal aid to airports.

Finally, Mr. Chairman, this legislation is discriminatory toward larger, primarily urban airports. The legislation proposes to increase the ratio of Federal to local funds to 75-25 for smaller airports, but would retain only 50-50 funding for the larger urban "hub" airports. The stated reason for this discrimination is that the larger airports have greater access to local funding. Yet the bill would remove one of the major means of raising local matching revenues employed by many larger airports—the airline passenger head tax. I see no justification for imposing this kind of inequity upon the larger airports. (*Id.* at 13,903).

. . . .

The CHAIRMAN. The Clerk will read.

The Clerk read as follows:

. . . .

"STATE TAXATION OF AIR COMMERCE

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

"(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an

airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

"(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

"(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until July 1, 1973." (*Id.* at 13,904).

. . . .

Mr. ADAMS. Mr. Chairman, I certainly regret having to oppose the amendment of my very good friends from cities which have this head tax. I must oppose it, however. This bill was carefully tailored to exempt from the head tax until the end of the year only those two cities which had gone to the Supreme Court and had received authorization for the tax and had started collecting it before the Congress had actuall moved to work on and prohibit the head tax.

The rest of the cities came in, in the face of the fact that the Senate and the House were working on it. As the Members will remember, the anti-head-tax bill was passed by this body the last time, and was also passed by the Senate, but was later pocket-vetoed by the President for reasons which had nothing to do with the head tax, but had to do with the granting of money out of the trust fund to these cities to make up for the moneys which they were receiving from the head tax.

The head tax is a very onerous thing. On page 4 of the report, the Members will see that there are now 44 cities with this tax. This is what we warned Members of the House about the last time, both at the time of the conference and at the time of the passage of the bill, that if we did not pass the bill promptly a number of cities would lay on this tax.

That is precisely what has happened. Those that have the tax on now put it on knowing full well that it was a tax in jeopardy. (*Id.* at 13,905).

. . . .

Mr. KUYKENDALL. Mr. Chairman, I rise in opposition to the amendment.

I should like to concur in the remarks of the gentleman from Washington (Mr. Adams) and to point out that both the Senate and the House have acted and passed legislation. The Senate acted first last year, I believe. In the case of the Senate, they absolutely banned the head tax. In the case of the House, it was an 18 months suspension.

The operators, the Airport Operators Council here in Washington, knew full well that legislation had passed both Houses though the veto came rather late in the year. The Airport Operators Council asked me, and my own local airport people asked me, "Do you expect the bill to be reintroduced?" I said, "Certainly. Yes."

They had a warning that the bill banning head taxes would be reintroduced.

Surely they had the right to do whatever they did, but they can hardly plead ignorance in this case..

I am opposed to the amendment. (*Id.* at 13,906).

. . . .

Mr. DINGELL. . . .

. . . .

But in addition to this, it must be recognized that head taxes are not limited as to amount, and they have grown from a very nominal figure, something like 50 cents per head, to something on the order of $2 or $4, and I think that the magnitude of growth under this set of circumstances is something which should well be borne in mind by the membership of this body.

. . . .

Mr. Chairman, there is something else I think the membership ought to know, and that is the rapid increase in the number of communities which levy head taxes at their airports. It started out with two; at the time the bill was passed last year the number had grown to 17; today the number is 44. Under the amendment which is before us, any community in the country could levy a head tax in any amount for any purposes. The amendment does not limit either the amount, nor does it limit the purposes for which a head tax might be imposed by the community, and my colleagues should bear that thought well in mind in considering the legislation before us. (*Id.* at 13,907).

. . . .

Mr. DINGELL. Under the amendment that is before us, and under the existing practice, if I were going from point A to point B by way of point C, which would be the transferring point, I could be charged a head tax at point A, a head tax when I got off the plane at point C, a head tax when I got back on at point C, and a head tax when I got off the plane finally at point B. (*Id.*).

. . . .

Mr. JARMAN. Mr. Chairman, I rise in opposition to the amendment.

Mr. Chairman, the only thing I would add to the argument that has been presented so far is that I believe the House should bear in mind that this body and the other

body acted in August of last year on this subject declaring its clear intent against the continuation of head taxes. Other cities then came in and levied head taxes when the intent of the Congress was very clear against this practice. I think there was every reason for the cities to know that the Congress would take action to prohibit these taxes. (*Id.* at 13,908).

. . . .

Mr. KUYKENDALL. . . .

. . . .

What we are doing is putting a premium on people who went ahead with the head tax even though they knew that Congress was in the process of holding hearings and would presently pass legislation against such a practice. We would be penalizing the cities who asked us for recommendations and used discretion in delaying such action. (*Id.*).

. . . .

Mr. KUYKENDALL. Mr. Chairman, may I point out that the Supreme Court decision said that such taxes may be passed if they are used only for airport purposes.

And a city that is going to be unnamed is clearly using these funds for general revenues. That is unconscionable. (*Id.*).

. . . .

The CHAIRMAN. The question is on the amendment offered by the gentleman from New Hampshire (Mr. WYMAN).

The amendment was rejected. (*Id.* at 13,908).

. . . .

Mr. WYMAN. Mr, Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Wyman: Page 4, strike out line 20 and all that follows down through Page 7, line 3 and the matter that follows line 3.

Mr. WYMAN. Mr. Chairman, my amendment would strike out language in H. R. 6388 which would prohibit collection of State and local airport head taxes. This is a matter of urgency for the Nation's 2,400 small air terminals not served by certified air carriers.

Such airports find it extremely difficult, if not impossible, to compete for available funds to take advantage of Federal matching grants without the airline landing fees and space rental revenues available to the larger hub airports. As a result, vitally needed improvements—including long overdue modernization of safety facilities—have had to be deferred. (*Id.*).

. . . .

Mr. JARMAN. Mr. Chairman, I rise in opposition to the amendment.

Mr. Chairman, I think most of the arguments have been made on this subject. If the House will refer to page 4 of the committee report, there is an indication of what the trend is: 44 cities levying this type tax.

I hope the House will bear in mind in voting on this amendment that the Congress itself established a uniform national program for the funding of aviation needs. Bear in mind that we now have an 8-percent charge on domestic passengers and a $3 per person charge on international travelers.

There is no question that the head taxes levied by the cities have made for confusion and resentment on the part of travelers. It is essential that we maintain a uniform national system. (*Id.* at 13,909).

. . . .

Mr. DOWNING. Mr. Chairman, I demand a recorded vote.

A recorded vote was refused.

So the amendment was rejected. (*Id.*).

. . . .

The SPEAKER. Pursuant to the provisions of House Resolution 370, the Committee on Interstate and Foreign Commerce is discharged from the further consideration of the bill, S. 38, to amend the Airport and Airway Development Act of 1970, as amended, to increase the U. S. share of allowable project costs under such act, to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes.

The Clerk read the title of the Senate bill.

Motion Offered By Mr. Staggers

Mr. STAGGERS. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. STAGGERS moves to strike out all after the enacting clause of the bill S. 38 and insert in lieu thereof the provisions of H. R. 6388, as passed, as follows: (*Id.* at 13,910).

. . . .

"STATE TAXATION OF AIR COMMERCE

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom;

except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

"(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a state (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

"(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

"(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans.

the provisions of subsection (a) shall not apply to such authority until December 31, 1973." (*Id.*).

. . . .

The motion was agreed to.

The Senate bill was ordered to be read a third time, was read the third time, and passed.

A motion to reconsider was laid on the table.

A similar House bill (H. R. 6388) was laid on the table. (*Id.*).

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119 CONG. REC. 14,662-63 (MAY 8, 1973).

Mr. ROBERT C. BYRD. Mr. President, on behalf of Mr. CANNON, I move that the Senate disagree to the amendment of the House on S. 38 and ask for a conference with the House on the disagreeing votes of the two Houses thereon, and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed to Mr. MAGNUSON, Mr. CANNON, Mr. HART, Mr. COTTON, and Mr. PEARSON conferees on the part of the Senate. (*Id.* at 16,663).

HOUSE OF REPRESENTATIVES

93d Congress
1st Session

No. 93-225

AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973

May 24, 1973.—Ordered to be printed

Mr. STAGGERS, from the committee of conference, Submitted the following

CONFERENCE REPORT

[To accompany S. 38]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 38) to amend the Airport and Airway Development Act of 1970, as amended, to increase the U. S. share of allowable project costs under such Act, to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Airport Development Acceleration Act of 1973".

. . . .

[p. 3] . . . .

"STATE TAXATION OF AIR COMMERCE

"Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom: except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

"(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

"(c) In the case of any airport operating authority which—

"(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

"(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

"(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until December 31, 1973.".

(b) That portion of the table of contents contained in the first section of such Act which appears under the center heading

. . . .

[p. 5]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill S. 38 to amend the Airport and Airway Development Act of 1970, as amended, to increase the United States share of allowable project costs under such Act, to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report.

The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text and the Senate disagreed to the House amendment.

The committee of conference recommends that the Senate recede from its disagreement to the amendment of

the House, with an amendment which is a substitute for both the Senate bill and the House amendment.

The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below.

Unless otherwise indicated, references to provisions of "existing law" contained in this joint statement refer to provisions of the Airport and Airway Development Act of 1970.

STATE TAXATION OF AIR COMMERCE

Senate bill

Section 7 of the Senate bill provided for a permanent prohibition against the levy or collection of a tax or other charge on persons traveling in air commerce, or on the carriage of persons so traveling, or on the sale of air transportation or on the gross receipts derived therefrom, by any State or political subdivision thereof (including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, or political agencies of two or more States). There were two exemptions from this prohibition.

First, any State which levied such charges before May 21, 1970, would be exempt from the prohibition until *July 1, 1973.*

Second, any airport operating authority which (1) has an outstanding obligation to repay money borrowed and expended for airport improvements, (2) has collected a head tax on air passengers, without carrier assistance, for the use of its facilities, and (3) has no authority to collect any other type of tax to repay the loan, would be exempt from the prohibition until *July 1, 1973.*

[p. 6] The Senate bill also provided that the prohibition would not extend to the levy or collection of other taxes, such as property taxes, net income taxes, franchise

taxes, and sales or use taxes, nor to the levy or collection of other charges such as reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

House amendment

The House amendment was substantially the same as the Senate bill, except that the exemptions from the prohibition against the levy and collection of the so-called airline passenger head taxes was extended from July 1, 1973, to December 31, 1973, and the exemption with respect to jurisdictions which impose such charges before May 21, 1970, was limited to those which *levied* and *collected* such charges rather than those which merely *levied* such charges.

Conference substitute

The conference substitute follows the House amendment in extending to December 31, 1973, the exemptions from the prohibition against the levy and collection of the so-called airline passenger head taxes and follows the Senate bill in extending the exemptions to jurisdictions which *levied* such taxes before May 21, 1970, rather than limiting the exemptions to those which *levied and collected* such taxes before such date.

119 CONG. REC. 16,891-93 (MAY 24, 1973).

CONFERENCE REPORT ON S. 38, AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973

Mr. STAGGERS submitted the following conference report and statement on the bill (S. 38) to amend the Airport and Airway Development Act of 1970, as amended, to increase the U.S. share of allowable project costs under such act, to amend the Federal Aviation Act of 1958, as amended, to prohibit certain State taxation of persons in air commerce, and for other purposes:

Conference Report (H. Rept. No. 93-225) [the text of H. Rept. No. 93-225 is reproduced here in the Congressional Record].

. . . .

STATE TAXATION OF AIR COMMERCE

Senate Bill

Section 7 of the Senate bill provided for a permanent prohibition against the levy or collection of a tax or other charge on persons traveling in air commerce, or on the carriage of persons so traveling, or on the sale of air transportation or on the gross receipts derived therefrom, by any State or political subdivision thereof (including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, or political agencies of two or more States). There were two exemptions from this prohibition.

First, any State which levied such charges before May 21, 1970, would be exempt from the prohibition until *July 1, 1973.*

Second, any airport operating authority which (1) has an outstanding obligation to repay money borrowed and expended for airport improvements, (2) has collected a head tax on air passengers, without carrier assistance, for the use of its facilities, and (3) has no authority to collect

any other type of tax to repay the loan, would be exempt from the prohibition until *July 1, 1973.*

The Senate bill also provided that the prohibition would not extend to the levy or collection of other taxes, such as property taxes, net income taxes, franchise taxes, and sales or use taxes, nor to the levy or collection of other charges such as reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

House Amendment

The House amendment was substantially the same as the Senate bill, except that the exemptions from the prohibition against the levy and collection of the so-called airline passenger head taxes was extended from July 1, 1973, to December 31, 1973, and the exemption with respect to jurisdictions which impose such charges before May 21, 1970, was limited to those which *levied and collected* such charges rather than those which merely *levied* such charges.

Conference Substitute

The conference substitute follows the House amendment in extending to December 31, 1973, the exemptions from the prohibition against the levy and collection of the so-called airline passenger head taxes, and follows the Senate bill in extending the exemptions to jurisdictions which *levied* such taxes before May 21, 1970, rather than limiting the exemptions to those which *levied and collected* such taxes before such date.

---

119 CONG. REC. 17,344 (MAY 30, 1973).

Mr. STAGGERS. Mr. Speaker, the House and Senate conferees have approved a compromise version of the Airport Development Acceleration Act of 1973 which, in my opinion, follows closely the version this House passed by a vote of 386 to 16 on May 2.

The main purpose of this bill, as the Members recall, is to ban the so-called airport head tax. We had seven of these taxes when we considered this legislation last year. This year we have 44.

The House and Senate had six points of disagreement when we each passed our separate legislation.

. . . .

Sixth. The conferees exempt three localities from the ban on head tax through the end of this year. We compromised on allowing Evansville, Ind., to be exempt. The Senate compromised by using our language to ban all head taxes after July 1 of this year except for three jurisdictions which are exempt through the end of the year.

. . . .

Mr. DEVINE. Mr. Speaker, I rise in support of the conference agreement on S. 38, the Airport Development Acceleration Act of 1973.

The House amendment to S. 38 was passed by this body by an overwhelming vote of 386 to 16 on May 2. The purpose of the bill was twofold—to prohibit the imposition of head taxes or gross receipts taxes by airport operators or States, and at the same time to increase the Federal share of funding for airport projects in medium hub and smaller cities to alleviate the problems that these cities have had in coming up with the local share.

---

119 CONG. REC. 18,045 (JUNE 5, 1973).

Mr. CANNON. Mr. President, I submit a report of the committee of conference on S. 38, and ask for its immediate consideration.

. . . .

(The conference report is printed in the House proceedings of the Congressional Record of May 24, 1973, at page 16891.)

. . . .

. . . Finally, our bill prohibits discriminatory State and local taxation on airline passengers and on the gross receipts derived from air transportation.

. . . .

[The joint explanatory statement from the Conference Committee report is reproduced here in the Congressional Record.]

Office-Supreme Court, U.S.
FILED
SEP 21 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-585 and 82-586

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION OF THE
STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF HAWAII

REPLY BRIEF OF APPELLANT ALOHA AIRLINES, INC.

RICHARD L. GRIFFITH*
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ALOHA AIRLINES, INC.

September 1983

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION OF THE
STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF HAWAII

REPLY BRIEF OF APPELLANT ALOHA AIRLINES, INC.

This Reply Brief is submitted on behalf of Aloha Airlines, Inc.[1] ("Aloha Airlines") in response to the Brief of the Director of Taxation of the State of Hawaii (the "Director") and the briefs submitted as amici by the States of Alaska, Arizona, Oklahoma, Washington and West Virginia; by the Multistate Tax Commission joined by certain other states; and by the State of New York.

[1]Except for a wholly-owned subsidiary, Aloha Airlines has no affiliates, parent companies or subsidiaries.

SUMMARY OF ARGUMENTS OF DIRECTOR AND AMICI AND OF THE REPLIES OF ALOHA AIRLINES

In their briefs, the Director and his amici raise four principal issues. A summary of the Director's argument as to each issue, with Aloha Airlines' reply to each, follows:

1. Is the Hawaii tax expressly permitted by subsection (b) of 49 U.S.C. § 1513?

The Director argues that the Hawaii Public Service Company Tax ("PSC Tax"), Haw. Rev. Stat. §239-6, is expressly exempted by subsection (b) of 49 U.S.C. § 1513 from the prohibitions of subsection (a) because it is reasonably characterized as a property tax.

In fact, the PSC Tax is not expressly exempted by subsection (b) of 49 U.S.C. § 1513. The forms of taxation listed in subsection (b) are permitted only if they are not prohibited by subsection (a). Subsection (b) does not serve to "exempt" any otherwise forbidden tax. Moreover, the PSC Tax would not qualify for exemption in any event since it is not, for the purposes of this federal statute, a "property" tax.

2. Is the Hawaii PSC Tax permissible under 49 U.S.C. §1513 because gross receipts from air carriage are the "measure" but not the "subject" of the tax?

The Director contends that even though the PSC Tax is measured by gross receipts, the tax is not "on" gross receipts from air transportation. The subject or incidence of the tax is instead on personal property, there being a "vast difference" between the "subject" of a tax and the "measure" of a tax.

Whatever viability still exists in the distinction between the "subject" of a tax and the "measure" of a tax in other contexts, it is irrelevant here because a federal statute having specific pre-emptive effect is involved. In enacting subsection (a) of 49

U.S.C. §1513, Congress was concerned not only with the legal incidence or "subject" of a forbidden state tax, but also with the economic burden or "measure" of such a tax. Congress clearly banned any state tax which would directly or indirectly add any state tax burden to the already steep federal excise tax on air fares.

3. Is the pre-emptive sweep of 49 U.S.C. § 1513 limited to user taxes and to certain narrowly defined substitutes for user taxes?

The Director alleges that 49 U.S.C. § 1513 is ambiguous because of seeming contradictions between subsections (a) and (b), and that the legislative history and certain rules of statutory construction indicate a circumscribed and narrow scope to the pre-emptive effect of the statute. Specifically:

a. Its pre-emptive impact is limited in principal part to user taxes, including head taxes, similar in incidence or effect to the user taxes imposed by the Airport and Airway Revenue Act of 1970.

b. To the extent that any pre-emptive effect of § 1513 extends beyond state user taxes, including "head taxes," it extends only to discriminatory taxes which are, in effect, substitutes for such user taxes and which are imposed discriminatorily against airlines and not against a wide range of other business.

This analysis totally misses the mark. User taxes and discriminatory substitutes therefor are merely two specific areas of mischief within a larger circle of congressional concern. In 49 U.S.C. §1513, Congress broadly identified and pre-empted any tax on persons traveling in air commerce or on the gross receipts derived therefrom. The reason for this legislative action is manifest: having imposed steep federal excise taxes on air transportation, eight per cent on domestic air fares and five per cent on air freight, Congress determined that this was as much taxation as air commerce should bear. Hence, any state tax on gross receipts from air carriage on top of the federal tax was

forbidden, whether or not the state tax was termed a "user" tax and even if the state tax did not discriminate against the airlines as compared to other lines of commerce in the state. It was the combined impact on air fares of a state tax on top of the federal excise tax that motivated Congress. Both the logic and the plain words of the federal statute require the conclusion that the Hawaii PSC Tax is pre-empted, and the overwhelming weight of legislative history supports this result as well.

4. Is the PSC Tax a general business tax of wide applicability which does not run counter to 49 U.S.C. § 1513?

The Director asserts that the PSC Tax, in purpose and effect, is a general business tax of wide applicability. As such, it runs counter to no federal policies, nor to 49 U.S.C. §1513, because it is consistent with long-standing congressional policy not to interfere with the general business taxes of states except in unusual, narrow, and specifically defined situations.

Again, the Director's argument misses the mark, because the Hawaii PSC Tax, whether or not it is discriminatory, imposes the specific burden on air transportation prohibited by 49 U.S.C. §1513. If the Hawaii PSC Tax of three or four per cent is imposed on top of the eight per cent federal tax on passenger air fares, the combined burden on air transportation of passengers (or gross receipts therefrom) amounts to 11 or 12 per cent. Imposition of that additional burden would undermine the mandate of Congress in the federal Airport Development Aid Program ("ADAP") and the federal policy to encourage aviation. The purpose of ADAP was to create a single federal fiscal package consisting of federal taxes on users of aviation facilities and federal expenditures to develop and improve such facilities. Thus, ADAP reflects a legitimate federal response to a national problem. The generalized argument of the Director on this point, reflecting a narrowly based parochial view, must in the national interest be swept aside by the specific purpose and mandate of 49 U.S.C. § 1513.

In addition, since Aloha Airlines filed its brief on the merits, the New York Court of Appeals has affirmed an Appel-

late Division decision striking down a New York tax similar to the Hawaii PSC Tax, and the Superior Court of the State of Alaska has ruled similarly in a case concerning an Alaska tax. The judiciaries of other states have implemented the plain language and intent of 49 U.S.C. § 1513, and have been unpersuaded by the arguments offered by the Director and amici in the present case. Only the Hawaii court has decided otherwise.

An affirmation of the Hawaii Supreme Court decision in this case would repudiate these well-reasoned decisions and would disrupt the balanced and finely tuned federal fiscal program to improve the nation's airport and airway system.

ARGUMENT IN REPLY

1. THE HAWAII PSC TAX IS NOT EXPRESSLY EXEMPT UNDER SUBSECTION (b) OF 49 U.S.C. § 1513 AND IS NOT REASONABLY CHARACTERIZED AS A PROPERTY TAX.

Statutory construction begins with the words of the statute. Subsection (a) of 49 U.S.C. §1513 expressly bars all state taxes on gross receipts from air transportation, whether the levy is direct or indirect. It does so without regard to what the tax is called or how it is labelled. In arguing that subsection (b) exempts from subsection (a) any state tax which is given the label of a tax listed in subsection (b), the Director ignores the plain words of the statute, which are explicit and clear in defining the relationship between the two subsections. Only those taxes not prohibited by the terms of subsection (a) can survive:

> (b) [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a)* of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . . . (emphasis added)

The phrase "other than those enumerated in subsection (a)" demonstrates that subsection (b) does not curtail the prohibitions of subsection (a). Subsection (b) merely explains that other types of taxes are not barred.[2] The Hawaii PSC Tax fails to clear the first hurdle in subsection (b), and thus its label is irrelevant.

Nor is the Hawaii PSC Tax reasonably characterized as a "property" tax. The tax is not related in any way to the personal property of the airlines in Hawaii. The tax is based on gross receipts, it rises and falls with gross receipts, and if the airline has no gross receipts, no tax is levied, regardless of the value or extent of the taxpayer's personal property. Obviously, the taxable incident which the Hawaii PSC Tax reaches is the taxpayer's gross receipts from air transportation. In fact, the PSC Tax return does not even make reference to the personal property of the airlines. (J.A. 36)

Although Haw. Rev. Stat. §239-6 describes the tax as a "means of taxing the personal property" of airlines, that characterization cannot be accepted for the purposes of the federal statute. No other Hawaii statute, whether in effect now or at the date of enactment of the PSC Tax or during the years here in issue (1974-1977), purports to tax the personal property of any other Hawaii taxpayer. Hawaii has not assessed a personal property tax since 1947. In the face of the obvious economic impact of the tax, to characterize it as a "property" tax permitted by 49 U.S.C. §1513(b) is to indulge in a legal fiction devoid of substance. For purposes of federal law, the state's description is not binding. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 347 (1968). Accepting

[2] It is noteworthy that subsection (b) lists "net income taxes" as permissible, which only emphasizes that *gross* receipts taxes, whether direct or indirect, are not.

this "personal property tax" fiction would vitiate the federal statute.[3]

2. THE DISTINCTION BETWEEN A "SUBJECT" OF TAX AND A "MEASURE" OF TAX IS IRRELEVANT SINCE THE PROHIBITORY COMMAND OF 49 U.S.C. §1513 REACHES BOTH

It is true, as the Director states, that this Court held in *Railway Express Agency v. Virginia*, 358 U.S. 434, 441 (1959) ("*REA II*"), that it was constitutionally permissible under the commerce clause for states to use gross receipts as the tax base for property taxation. But *REA II* is not relevant to this case because it involved no federal statute claimed to have preemptive force, as does 49 U.S.C. §1513. The predominance of a specific federal statute under the supremacy clause was not involved in *REA II*,[4] so it provides no rule of construction for

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[3]The Director observes (at 2, 9, 10, 26 and 46) that the continued voluntary payments by the airlines of the PSC Tax for a time after the enactment of 49 U.S.C. §1513 and their "belated" filing of the present claims must indicate doubt on their part as to applicability of that statute to the PSC Tax. This argument is advanced by the Director for the first time on brief in this Court. If it had been advanced at trial, Aloha Airlines would have had the opportunity to present evidence that such voluntary payments were made while Aloha Airlines was holding discussions with the Director as to possible alternatives to litigation, that a cessation of such payments would have triggered an assessment of the PSC Tax, and that such assessment would have forced Aloha Airlines to file in court within 30 days under Haw. Rev. Stat. §§239-7 & 235-114, thus prematurely ending the search for an out-of-court solution. In the end, no such solution was achieved, and Aloha Airlines commenced this case by filing a timely appeal in the Hawaii Tax Appeal Court, covering tax years starting with 1974, the first year after the enactment of 49 U.S.C. §1513. There is nothing "belated" about Aloha Airlines' claim.

[4]*REA II* merely held that a state "franchise" tax, measured by in-state gross receipts and in lieu of all other property taxes on rolling stock and intangibles, was not invalid under the commerce clause. *REA II* was careful to disclaim that a state "legislature may effect a validation of a tax, otherwise unconstitutional, by merely changing its descriptive words." 358 U.S. at 441.

determining what Congress meant in 49 U.S.C. §1513.[5] That a gross receipts measure may be permissible in the absence of relevant legislation does not assure its continued validity when a statute with a clear pre-emptive purpose is enacted.

This Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), rejected a claim that a Mississippi tax on the privilege of doing business in that state, which was measured by "gross proceeds of sales or gross income or values," was unconstitutional as a tax on interstate commerce. In doing so, the Court overruled a previous decision which focused on the label given to the state tax. Reviewing other decisions, the Court noted that "[t]hese decisions have considered not the formal language of the tax statute but rather its practical effect." *Id.* at 279. The Court rejected the use of labels as being determinative, observing that: "The reason for attaching constitutional significance to a semantic difference is difficult to discern." *Id.* at 285. In the present case, where the issue is whether the PSC Tax is prohibited by a particular federal statute, it is similarly unacceptable to let the decision turn on semantic distinctions. Yet that is the essence of the Director's argument.

The proper question here is the intent of Congress in enacting §1513. That intent is discussed more fully below, but for now it is enough to note that nothing supports the Director's view that Congress intended to distinguish between "subject" and "measure" in this fashion or to make the prohibition contained in the statute so easy to evade. There is even less reason to attach significance to this distinction in light of the use of the words "directly or indirectly" within the prohibition of subsection (a). Congress was not concerned with semantic niceties; it meant to prevent a certain kind of taxation in any guise. The Director and his amici have failed to cite a single

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[5] As discussed in Aloha Airlines' brief on the merits, at 16-18, the existence of an express federal prohibition requires a different kind of "pre-emption" analysis. *See, e.g., Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

current authority supporting the "subject vs. measure" distinction to avoid the application of a federal statute with preemptive purpose. That is for good reason: such a distinction makes no sense.

3. THE HAWAII PSC TAX IS NOT PROTECTED AS SOMETHING OTHER THAN A "USER" TAX OR AS A "NON-DISCRIMINATORY" TAX, SINCE IT IS PRECISELY THE KIND OF TAX THE FEDERAL STATUTE PROHIBITS

Perhaps in recognition that the plain words of 49 U.S.C. §1513 are inconsistent with their position, the Director and his amici focus most of their discussion on an effort to rewrite the statute by an analysis of purported congressional intent gleaned from legislative history. By using highly selective quotations from the legislative history, they have created an interpretation of the federal statute which is at odds with its plain terms and inconsistent with its purpose. The Director contends that the statute is intended "*only* to prevent the states from: (1) directly or indirectly imposing taxes similar to the federal taxes already imposed by Congress *on users of air transportation* . . .; and (2) imposing *discriminatory* taxes on airlines that, in effect, would impose the forbidden federal user taxes by an indirect means." (emphasis added) (Director's brief, at 7.) The Director's effort is futile, however, for the statute which he purports to interpret is not the statute which Congress has written.

(a) The prohibitions of 49 U.S.C. §1513 are not limited to taxes imposed upon users.

The federal program to aid the development of the nation's airports is primarily financed by a tax of eight per cent of the gross receipts from the sale of domestic passenger tickets, a tax of five per cent of receipts from air freight, and a flat $3.00 tax on each international passenger ticket. The Director contends that the federal prohibition in §1513 is limited to taxes similar to these user taxes.

The notion that Congress intended to prohibit only "head" taxes and taxes imposed directly upon the passengers and freight users of the aviation system, and not taxes imposed upon airlines, cannot be reconciled with the language in §1513(a) prohibiting taxation of "the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." Obviously, these words refer to the carriage by, the sales by, or the gross receipts of the airlines. If Congress had meant to prohibit only "user" taxes, it would not have included such language, which could only refer to taxes imposed on airlines.

Congress acted logically in including the airlines, for to be effective such a prohibition must apply to both parties to the transaction. In economic terms, a three or four per cent tax on the price of an airplane ticket, paid by the passenger, and a three or four per cent tax on the price of an airline ticket, paid by the airline from the revenue received from the passenger, are exactly the same, and they will have exactly the same effect—raising the total cost of the airplane ticket by three or four per cent.[6] It is that effect which Congress sought to prevent.

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[6]This Court made a similar observation in a somewhat different context in *Washington v. United States*, ___ U.S. ___, 75 L.Ed.2d 264, 103 S.Ct. 1344 (1983), when it spoke of a sales tax that could be placed upon either the contractor putting up a building (the seller) or the landowner for whom the building is constructed (the buyer):

> If the tax is the same, and the parties have the same bargaining power, the amounts the purchasers pay and the amounts the contractors receive will be identical in the two cases. Thus, it makes no difference to the contractor (or to the purchasers) which of them is required to pay the tax to the State, as long as they have the opportunity to allocate the burden among themselves by adjusting the price.

75 L.Ed.2d at 270 n.4. In that case the Court ultimately upheld the application of a state sales tax against a claim under the supremacy clause that it discriminated against contractors for the federal government. In the present case, the concern of Congress was with the effective burden of a tax on air fares, not with whether it would nominally come from the pocket of the passenger or the airline. In economic terms, it does not matter from which pocket the money is taken.

The Director has virtually conceded that the Hawaii PSC Tax must fall within the federal prohibition. In footnote 5 on page 13 of his brief, the Director defines "head tax":

> This brief uses the phrase "head tax" to mean a tax on each person that is a member of a designated class or group. In this case, it represents a tax levied on air passengers and may be either a flat rate tax or a percentage of fare tax. The tax may be either a direct tax collected from each passenger (as an enplaning or deplaning fee) *or an indirect tax imposed upon the airline but ultimately paid by the passenger*. (emphasis added)

That definition unmistakably covers and forbids the Hawaii tax at issue. What else can this be but a tax ultimately paid by the passenger? If all airlines are required to pay a three per cent tax on their ticket revenue, that tax will inevitably be passed on to the passengers as a direct cost of doing business. Since all airlines have to pay the tax, and since it varies exactly with ticket revenue, no other result makes sense.[7]

Indeed, Hawaii's own tax system contains an analogy proving the point. Chapter 237, Haw. Rev. Stat., imposes a privilege tax which, like the PSC Tax, is measured by gross income. Formally, the tax is imposed on the recipient of money, meaning the seller in a sales transaction. Nevertheless, that tax is recognized by the Internal Revenue Service as a sales tax which is deductible by the buyer in computing his federal income tax, and is similarly recognized by the Director as a sales tax deductible by the buyer for purposes of Hawaii's income tax. Obviously, the Director, like the Internal Revenue Service, recognizes that the real impact of the tax falls on the

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[7]This is a distinction between the taxes prohibited in §1513(a) and those listed in §1513(b) as being something else. Net income taxes and true property taxes, including the real property taxes which have been paid by Aloha Airlines, may be borne by its customers in some indirect sense, but they are not so immediately and exactly passed on to raise the ticket price by the amount of the tax.

buyer. So, too, would the real impact of the PSC Tax fall on the passenger and the freight user.[8]

That is precisely what Congress meant to prevent. Even accepting the Director's formulation, then, the PSC tax cannot survive, for it would do exactly what is prohibited—impose a state tax on air transportation users similar to the federal excise tax.

Congress was gravely concerned that a state tax on gross receipts from air carriage, when imposed on top of the federal eight per cent tax on air fares or five per cent tax on air freight, would unduly burden air commerce. In fact, the congressional concern is well founded. Consider the impact of the tax in Hawaii. The three or four per cent PSC tax when added to the eight per cent federal tax produces a total tax burden on passenger tickets of 11 or 12 per cent.[9] Congress acted well within reason when it decided that such a burden would be too heavy and thus would be contrary to the policy of encouraging aviation development.

A fair and balanced review of the legislative record only serves to reinforce the plain meaning of the statute and to discredit the strained interpretation of the Director.[10] Two particular observations are appropriate. First, the Director's efforts to limit the federal prohibition to "head charges" in some

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[8] In another sense, of course, the adverse effect of such a tax would also fall on the airlines. Since the tax would inevitably raise ticket prices and freight charges, use of the aviation system by the public would be discouraged and would decline, to the airlines' detriment. That result would be exactly contrary to the purpose of the federal aviation policy and program, including ADAP and §1513.

[9] The Hawaii PSC Tax is assessed at a rate of three or four percent, depending on whether the airline offers a discount rate schedule for school groups. See Aloha Airlines' brief on the merits, at 11.

[10] See the history outlined in Aloha Airlines' brief on the merits at 18-23; Hawaiian Airlines' brief on the merits at 16-24; and the brief of the Air Transport Association of America as amicus curiae in support of Appellants at 6-13.

narrower sense must fail, not only because the statutory language is far broader ("No State . . . shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, . . ."), but also because the legislative history reflects a broader concern. The antecedents of 49 U.S.C. §1513 preceded, by over one year, this Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), which sparked concern about a proliferation of flat-amount head charges.

Second, the fact that Congress was concerned about such head charges and intended to prohibit them does not at all mean that such charges were its only concern and that it meant to prohibit only such charges. It is true, as the Director demonstrates, that Congress was concerned about head charges, but the Director has not and cannot demonstrate that the concern—and the prohibition—stopped there. It did not. Congress acted in a broader fashion. As stated in the conclusion of the 1973 report of the Senate Committee on Commerce:

> In accepting a greater Federal role and responsibility in airport development the Committee has also acted *to prohibit local taxation on passengers or on the carriage of passengers*. (emphasis added)

S. Rep. No. 12, 93d Cong., 1st Sess. 26 (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1455, and in the Legislative History Appendix to the Director's brief, at 121. The logic of the federal statute required no less.

(b) The federal prohibition is not limited to "discriminatory" state taxes.

The interpretation of §1513(a) as merely prohibiting "discriminatory" state taxes is even more strained than the view that it extends only to taxes on users. That is not what the statute says. If that had been the intent of Congress, it would have said so. Even the Director concedes that the subject was "not addressed in the legislative history in any significant manner." (Director's brief at 12.) Besides, as was noted above in dis-

cussing head charges, to establish that there was congressional concern about discriminatory taxation does not establish that the concern stopped there.

In fact, the legislative record affirms that congressional concern did not stop there. An attempt was made in 1973 to amend the pending bill in the same way that the Director is here trying to rewrite the statute, and it was spurned. Congress turned a deaf ear to the State of Ohio in 1973 when that state sought to persuade Congress to add specific language to what would become 49 U.S.C. §1513 to permit "non-discriminatory" state taxation of gross receipts from air transportation.

The Ohio Deputy Tax Commissioner, Theodore Koetz, testified before a House subcommittee that the then-existing Ohio excise tax on gross receipts from air transportation was non-discriminatory. He indicated that in Ohio most businesses pay a franchise tax and a personal property tax, the latter being either a general personal property tax or the public utility ad valorem tax. Airlines, however, although subject to both the franchise tax and the personal property tax, only paid a small personal property tax, because unlike most other businesses, their major personal property, aircraft, was not subject to personal property tax. He went on to compare the total state taxes paid by airlines against the much larger amounts paid by railroads and the trucking industry.[11]

Then, in hopes of saving Ohio's four per cent excise tax on airlines' gross receipts, Mr. Koetz proposed to the Committee that the language italicized below be added to subsection (b) in an effort to permit state taxes on air carrier gross receipts if those

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[11] Airport Development Acceleration Act of 1973; Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong. 1st Sess. 247 (1973) (Statement of Theodore Koetz), *reprinted in* the Director's Legislative History Appendix, at 145.

taxes were fairly apportioned to a particular state:

> (b) Nothing herein shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, sales or use taxes on the sale of goods or services, *privilege or excise taxes, and gross receipts taxes fairly apportioned to a State* . . . . (emphasis added)

Id. at 249, *reprinted in* the Director's Legislative History Appendix, at 147-48.

Congress refused to adopt this language, which, of course, would have undercut the basic objective of prohibiting state taxes on the gross receipts which Congress itself was taxing. This specifically illustrates that Congress intended to bar any tax on or measured by gross receipts from air carriage, whether or not the tax was "discriminatory" within the narrow context of a given state's tax structure.

Congress may well have cared about "discrimination" as discussed by the Director, but it cared about much more, including "discrimination" against airlines and their customers if faced with state taxes on top of the federal taxes. The "public interest" in connection with the federal aviation program was defined at that time by statute as being served by the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges" and by the "promotion, encouragement, and development of civil aeronautics." 49 U.S.C. §1302(c) & (f) (amended 1977, 1978, 1980) and §1303(b).[12] That public interest, Congress fairly decided, would not be served by permitting this kind of state tax.

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[12] Some of this statutory language was subsequently amended in connection with the deregulation of the aviation industry. In current language, the "public interest" is defined as served by the "availability of a variety of adequate, economic, efficient, and low-price services" and, as before, by the "promotion, encouragement, and development of civil aeronautics." 49 U.S.C. §1302(a)(3) & (11) and §1303(b).

4. THE HAWAII PSC TAX IS NOT PROTECTED AS A GENERAL BUSINESS TAX, FOR IT RUNS COUNTER TO A SPECIFIC FEDERAL POLICY AND PROGRAM

The principal theme sounded by the Director and his amici is that the PSC Tax is essentially similar to a general business tax of wide applicability and, as such, runs counter to no federal policies but is consistent with long-standing congressional policy not to interfere with the general business taxes of states except in narrow and specifically defined situations.[13]

The flaw in the Director's argument is that it does not deal with the specific congressional policy embodied in ADAP and 49 U.S.C. §1513 in particular. In this case, the taxing power of the state must give way to federal pre-emption because of the national interest involved. Congress, in enacting 49 U.S.C. §1513, has made its own legislative finding that taxes, such as the PSC Tax, however reasonable and benign in purpose or name, are unreasonable and must be forbidden if they impose a tax burden on gross receipts from air transportation. This legislative finding is rationally based, and no court, state or federal, can or should set it aside.

In enacting ADAP, Congress created a finely balanced, federal fiscal package consisting of federal taxes on users of aviation facilities and federal expenditures to develop and im-

[13] As discussed earlier, the characterization of the Hawaii PSC Tax as a "general business tax" in the form of a personal property tax is dubious at best given that Hawaii does not have a personal property tax of general application.

prove such facilities.[14] As the 1973 Report of the Senate Committee on Commerce stated:

> In accepting a greater Federal role and responsibility in airport development the Committee has also acted to *prohibit local taxation* on passengers or *on the carriage of passengers*. We believe such taxation to be *inimical to the development of a national system* [of airport development] funded in large part *by uniform Federal taxes*. (emphasis added)

S. Rep. No. 12, 93d Cong., 1st Sess. 26 (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1455, and in the Director's Legislative History Appendix, at 121. Clearly, the enactment of 49 U.S.C. §1513 was intended to safeguard the integrity and uniformity of a single federal fiscal structure for airport development. Consequently, one will search the statute's history in vain to find a congressional purpose to permit continued state taxation of gross receipts from air carriage

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[14]The states may be precluded from imposing certain taxes under § 1513, but in return they receive the benefit of the revenues devoted to airport development. Hawaii has received a rich endowment under ADAP, receiving the following sums in the years 1971 through 1979 for airport development:

Year	Federal Contribution to Hawaii under ADAP
1971	$ 285,000
1972	1,192,000
1973	4,637,000
1974	8,212,000
1975	8,029,000
1976	3,612,460
1977	12,781,000
1978	15,048,000
1979	7,794,000
1971-1979 Total	$61,590,460

(J.A., at 19)

merely because the burden of such tax, considered in the isolated context of a single state's tax structure, is no greater on air commerce than on other forms of commerce. To the contrary, *all* state gross receipts taxes on air carriage were proscribed by 49 U.S.C. §1513, reflecting a congressional determination to prevent any tax burden in addition to the federal tax.

5. RECENT DECISIONS FROM OTHER STATES SUPPORT THE POSITION OF APPELLANTS

The brief on the merits filed by Aloha Airlines described, at 14-15, the decision of the New York Supreme Court, Appellate Division, in *Air Transport Ass'n v. New York Dept. of Taxation and Finance*, 91 A.D.2d 169, 458 N.Y.S.2d 709 (N.Y. App. Div. 1983), which held the application of a New York "franchise" tax to airlines to be prohibited by 49 U.S.C. §1513(a). (That opinion was reprinted in full as Appendix B to Hawaiian Airlines' brief on the merits and within the appendix to the amicus brief filed by the Air Transport Association of America.) That court was aware of the Hawaii Supreme Court opinion in the present case but explicitly rejected its reasoning, citing it as "but see" authority.

On June 28, 1983 the Court of Appeals of New York unanimously affirmed that decision. It did so without additional comment, relying upon the reasons stated in the Appellate Division opinion.[15]

Aloha Airlines' brief on the merits, at 15, n. 9, also noted the pendency of litigation on this subject in Alaska.[16] In an

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[15] Aloha Airlines has been advised that the State of New York has sought review of the Court of Appeals' decision in this Court by means of a petition of writ of certiorari, dated July 25, 1983.

[16] The State of Alaska has joined in one of the amicus briefs filed in support of the Director in this appeal.

Order and Judgment filed on May 6, 1983, the Superior Court for Alaska, Third Judicial District, held that:

> By virtue of the clear and unequivocal prohibition contained in 49 U.S.C. 1513(a) and (b) and the Supremacy Clause of the United States Constitution, the Alaska Business License Tax Act may not constitutionally be applied to tax Wien's carriage of passengers or mail or Wien's interstate, foreign or overseas carriage of freight.

Wien Air Alaska, Inc. v. State of Alaska, Dept. of Revenue, No. 3AN 81-8582 Civil (Alaska Superior Ct., 3d Dist., May 6, 1983). (The Order and Judgment is reprinted as the Appendix to this brief.)

These decisions have joined those of the Arizona Court of Appeals, in *State v. Cochise Airlines, Inc.*, 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980), and the Attorney General of Ohio, in Ohio Op. Att'y Gen. No. 73-117 (Nov. 20, 1973), in applying 49 U.S.C. §1513(a) to prohibit state attempts to tax the gross receipts of airlines. Only the Hawaii Supreme Court holds otherwise. The Hawaii decision is the aberration, and it should be reversed.

CONCLUSION

The interpretation of 49 U.S.C. §1513 offered by the Supreme Court of Hawaii and defended by the Director and his amici in this appeal is contrary to the plain language of that statute and would serve to vitiate it. The decision is contrary to the intent and legislative history of the federal statute at issue and puts in jeopardy the important federal program to promote civil aviation. As stated by the Solicitor General in his Brief For The United States As Amicus Curiae In Support Of Appellants, at 2, the "Hawaii tax is a flagrant violation of federal law, and if it is sustained the prohibition contained in Section 1513(a) will be rendered ineffective." The decision of the Supreme Court of Hawaii must be reversed.

Respectfully submitted,

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Aloha Airlines, Inc.

September 1983

APPENDIX

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

WIEN AIR ALASKA, INC.,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF REVENUE,

Appellee.

CASE NO. 3AN 81-8582 Civil

ORDER AND JUDGMENT

This is an appeal from a decision and order of the Alaska Department of Revenue entitled Decision No. 81-34, dated November 10, 1981. The matter came on for hearing before the undersigned on March 11, 1983. Appellant, Wien Air Alaska, Inc. was represented by James N. Reeves and John T. Piper.

The appellee, State of Alaska, was represented by Diane T. Colvin, Assistant Attorney General. In accord with the Court's ruling at the hearing,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. By virtue of the clear and unequivocal prohibition contained in 49 U.S.C. 1513(a) and (b) and the Supremacy Clause of the United States Constitution, the Alaska Business License Tax Act may not constitutionally be applied to tax Wien's carriage of passengers or mail or Wien's interstate, foreign or overseas carriage of freight. For the purpose of this judgment, interstate carriage of freight includes Wien's carriage between two points entirely within Alaska if the carriage is part of a continuous interstate journey (for example, carriage of freight via another carrier to Anchorage and carriage by Wien from Anchorage to Fairbanks); and, for years prior to 1978, interstate carriage also includes flights between points in Alaska if the flights travel over international waters.

2. The Alaska Business License Tax Act is not a "franchise tax" within the meaning of 49 U.S.C. §1513(b).

3. Wien's estoppel argument is rejected due to the lack of any evidence of reasonable detrimental reliance on administrative practice.

4. Wien's contention that the proceeds from the sale of its "bush community" business segment are not gross receipts from a "business" within the meaning of AS 43.70.110 is rejected for the reason that transactions in aircraft are, as a matter of judicial notice, a regular part of an airline's business.

5. For the reasons stated herein, Decision No. 81-34 of the Alaska Department of Revenue is hereby reversed in part and affirmed in part.

6. The Court holds that this is a final order and judgment disposing of this appeal *in toto*. In the alternative, the Court hereby determines that there is no just reason for delay and that judgment as to the issues or claims addressed herein may be

entered forthwith pursuant to Rule 54(b) of the Alaska Rules of Civil Procedure.

DATED this 3rd day of May, 1983.

/s/ Milton M. Souter

Honorable Milton M. Souter
Judge of the Alaska Superior
Court for the Third Judicial
District

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NOS. 82-585 and 82-586

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, Appellee.

REPLY BRIEF FOR APPELLANT HAWAIIAN AIRLINES, INC.

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September 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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HAWAIIAN AIRLINES, INC., Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

REPLY BRIEF FOR APPELLANT HAWAIIAN AIRLINES, INC.

This Reply Brief is submitted on behalf of Hawaiian Airlines, Inc. ("Hawaiian") in response to the Brief of the Director of Taxation of the State of Hawaii (the "Director"), and the Briefs submitted as amici of the Director by the States of Alaska, Arizona, Oklahoma, Washington and West Virginia (the "States"), the Multistate Tax Commission (the "MTC") and participating states and the State of New York ("N.Y.").

SUMMARY OF REPLY ARGUMENT

A statute of the United States, 49 U.S.C. § 1513, provides that no state may levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. The states may levy and collect taxes such as property taxes, net income taxes, franchise taxes and sales or use taxes, so long as such taxes are not levied or collected on the gross receipts from any of the above-listed activities or on any of such activities. 49 U.S.C. § 1513(b).[1] The Hawaii public service company tax (the "PSC tax") is assessed against Hawaiian and collected at the rate of 3% of the gross receipts derived by Hawaiian from the above-listed activities. It is therefore specifically prohibited by 49 U.S.C. § 1513(a).

The Director makes several principal arguments in support of his position that the PSC tax is not prohibited. First, as the Director has stated the issue in framing the "question presented" in his "Motion to Dismiss or Affirm", page 1:

> Whether a Hawaii tax is a property tax or a gross receipts tax. If it is a property tax, it is expressly permitted by 49 U.S.C. 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. 1513(a).

Hawaiian's reply is simply stated. If the PSC tax is a gross receipts tax, which it must be because it is a tax of 3% of gross income, then even the Director acknowledges that it is prohibited. Even if the PSC tax is characterized as a property tax, it is nevertheless not permitted by 49 U.S.C. § 1513(b) because it is levied and collected on the gross receipts of Hawaiian from the above-listed

---

[1] These conclusions are confirmed by the courts of all the states which have considered the matter to date (Alaska, Arizona and New York) and one state attorney general's opinion (Ohio), the only exception being the Hawaii decision at issue in this case. *See Wien Air Alaska v. State Dep't of Revenue*, No. 3 AN 818582 Civ. (Alaska Super. Ct., 3d Dist., May 6, 1983); *State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980); *Air Transport Ass'n v. New York State Dep't of Taxation and Fin.*, 91 A.D. 2d 150, 169, 458 N.Y.S.2d 709 (N.Y. App. Div. 1983), *aff'd*, No. 326 (N.Y. June 28, 1983); Ohio Op. Att'y Gen. No. 73-117 (1973).

activities and, therefore, expressly prohibited by 49 U.S.C. § 1513(a).

Second, another principal premise of the Director's argument is that the prohibition contained in 49 U.S.C. § 1513(a), when applied to prohibit the imposition of the PSC tax, "produces discriminatory, illogical, and inequitable results that were not intended by Congress and which are not supported by the voluminous legislative history." Director's Brief, hereinafter cited as "Dir. Br.", at 27. Based upon this premise, the gist of the Director's argument is that the Court should (1) remedy these perceived defects by excising from Section 1513(a), through statutory interpretation, any tax prohibition except "head taxes" of states and their political subdivisions (Dir. Br. at 34) and (2) hold that the PSC tax as applied to the gross income of Hawaiian from the carriage of persons by air between airports on the islands of the State of Hawaii over international waters ("Hawaiian's Passenger Revenues") is not a "head tax" because it is "reasonably characterized as a property tax".[2] In an attempt to support this position, the Director makes a series of specious arguments regarding the proper statutory construction of 49 U.S.C. § 1513. In addition, the Director sets forth a distorted interpretation of the legislative history of the statute to support his contention that Congress did not intend the broad prohibition contained in the statutory language.

The prohibition in Section 1513(a) is a keystone of the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88, in which it was included. The Director makes no mention of the substantial financial benefits which the State of Hawaii has received

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[2]The Director recognizes that a "head tax" may be a "percentage of fare tax" and "an indirect tax imposed upon the airline but ultimately paid by the passenger" (Dir. Br. at 13 n.5). This is also acknowledged in the MTC Brief at 11 n.13 and at 16. The PSC tax is a "percentage of fare tax" imposed upon Hawaiian based on the carriage of persons in "air commerce" and the sale of "air transportation" (*i.e.*, in this case 3% of the gross income from the passenger's fare). Since the tax is on the gross amount of or gross receipts from the passenger's fare, it must be paid by the passenger in order for the airline to recover the full amount of the fare. In this case there is no dispute that the terms "gross receipts" and "gross income" are synonymous. Dir. Br. at 7 n.2, MTC Br. at 8 n.10; Joint Appendix (hereinafter cited as "J.A.") at 15-16, ¶ 5. Thus, the PSC tax is a prohibited "head tax" under the Director's definition.

pursuant to that Act.[3] In light of these substantial benefits, the prohibition in Section 1513(a) is neither illogical nor inequitable and it does not result in any constitutionally proscribed form of discrimination. Furthermore, an examination of the Director's "rules" of statutory construction reveals that they are either inapplicable or erroneously applied and, in either event, presented in an apparent attempt to obscure the plain meaning of the federal statute. Finally, a complete reading of applicable legislative history demonstrates that the broad prohibition in 49 U.S.C. § 1513 of taxes such as the PSC tax was intended.

ARGUMENT

1. THE TERMS OF 49 U.S.C. § 1513

A. Subsection (a).

Subsection (a) of Section 1513 by its plain and unambiguous terms prohibits a state from levying or collecting:

> . . . a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . . .

Neither the Director nor any of the amici contends that there is any ambiguity in the terms of the prohibition in subsection (a) of Section 1513. Rather, the Director and amici contend that the terms of subsections (b) and (c) of Section 1513 make the plain language and terms of subsection (a)'s prohibition ambiguous, because of exceptions or exemptions in subsection (b) and because of the temporary exemption in subsection (c). *See, e.g.*, Dir. Br. at 30, 47; States Br. at 14, 15, 16; N.Y. Br. at 4. However, there is no ambiguity.

---

[3] For the period including fiscal years ending 1971 to 1973, federal grants for airport and airway development in Hawaii amounted to $6,114,000 or an average of $2,038,000 per fiscal year. For the period including fiscal years ending 1974 to 1978, after enactment of 49 U.S.C. § 1513, federal grants for airport and airway development in Hawaii amounted to $47,682,000, or an average of $9,536,400 per fiscal year. J.A. at 20, ¶ 16.

B. **Subsection (b).**

Subsection (b) of Section 1513, as it relates to permissible state taxes and fees, provides:

> [1] Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes . . . (emphasis added)
>
> and
>
> [2] . . . nothing in this section shall prohibit a State . . . from levying or collecting reasonable rental charges, landing fees, and other service charges . . . .

The terms of these two clauses of subsection (b) are parallel with one critical difference. The phrase "other than those enumerated in subsection (a) of this section" applies to taxes but not to "*reasonable* rental charges, landing fees, and other service charges."[4] (Emphasis added.)

The phrase "taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes" contained in subsection (b) does not create ambiguity between subsections (a) and (b) as contended. In fact, it eliminates the possibility of any such ambiguity. The phrase is an exception to the listing of taxes in subsection (b) which confirms that subsection (b) approves taxes only when they are not enumerated in subsection (a). The phrase is not in any sense, as contended by the Director, an exception to the prohibition in subsection (a). Accordingly, a property tax measured by a percentage of the fair market value of the property would not be prohibited but a property tax measured by gross receipts from the carriage of passengers or sale of air transportation [a tax enumerated in subsection (a)] would be.

The claimed ambiguity in or exception to the prohibition of *state taxes* in subsection (a), allegedly created by subsection (b), is a

---

[4]Thus, a state may collect rental charges, landing fees and other service charges based on airline gross receipts provided they are "reasonable". *Island Aviation, Inc. v. Guam Airport Auth.*, 562 F. Supp. 951, 958 (D. Guam 1982) (memorandum order).

consequence of an improper and fractured reading of subsection (b). This is demonstrated by the assertion in the States Br. (at 15) as follows:

> Subsection (b) states that included in the taxes "other than those enumerated in subsection (a)" are a number of types of generally applicable state business taxes . . . .

Subsection (b) does not list taxes that are included in "taxes other than those enumerated in subsection (a)." Subsection (b) simply states that certain "taxes other than those enumerated in subsection (a)" are permitted, and includes an enumeration of illustrative types of taxes which are so permitted so long as they are not "enumerated in subsection (a)."[5]

Subsection (a) does not control over subsection (b) in all respects, however, and the States are in error in their characterization of the airlines' position (States Br. at 15-16) that:

---

[5] The claimed ambiguity created by subsection (b) is described in the States Br. (at 15) as follows:

> Two comparisons of subsections (a) and (b) indicate that the meaning of § 1513 at least is ambiguous.
>
> First, subsection (b) permits sales tax [sic] on the sale of goods or services. Subsection (a) purports to prohibit a tax on the sale of air transportation. This is inherently contradictory in that a sales tax on air transportation is a sales tax on a service.
>
> . . . .
>
> Second, subsection (b) allows franchise taxes or property taxes.

Because subsection (b) permits or allows sales taxes, franchise taxes and property taxes *only* if they are not "enumerated in subsection (a)", *i.e.* not based for instance on gross receipts from air commerce or air transportation, the two subsections are harmonious. An example of a sales tax which is permitted by subsection (b) and not prohibited by virtue of its being enumerated in subsection (a), is a sales tax on food or beverages sold by an airline [*Air Jamaica, Ltd. v. Florida*, 374 So. 2d 575 (Fla. Dist. Ct. App. 1979)] or a sales tax on a service rendered by an airline to another airline for baggage handling, cleaning of aircraft etc.

> . . . the response by the airlines that subsection (a) controls over subsection (b) in all respects flies in the face of another comparison and its history. Subsection (b) exempts from the subsection (a) preemption "rental charges, landing fees, and other service charges ****" This language was added in (b) because industry representatives, including the ATA, recognized that such charges would fall within the prohibition of subsection (a). (Footnote omitted.)

Contrary to the States argument in misstating appellant's position, this "comparison and its history" demonstrates the absence of an exception or ambiguity in subsection (b) with respect to the prohibition of *state taxes*, rather than the existence of one. Under subsection (b), "reasonable rental charges, landing fees and other service charges from aircraft operations for the use of airport facilities" are not subject to the clause "other than those enumerated in subsection (a)." Thus, by the plain terms of subsection (b), the prohibition of subsection (a) controls over subsection (b) with respect to *state taxes* but not with respect to "reasonable rental charges, landing fees or other service charges from aircraft operators for the use of airport facilities." Thus, for example, *reasonable* landing fees measured by gross receipts would be permissible.

C. **Subsection (c).**

Subsection (c) granted a temporary exemption from the provisions of subsection (a) (until December 31, 1973) to any airport operating authority which met three enumerated conditions, namely, an authority which

> (1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;
>
> (2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and
>
> (3) has no authority to collect any other type of tax to repay such loan or loans.

The Director (Dir. Br. at 30 n.33) and the States (States Br. at 16 n. 31) argue that subsection (c) can be read consistently or logically with subsection (a) only if the prohibition in subsection (a) is limited to "head taxes" because otherwise "Congress would be imputed with

the illogical and unwarranted intent to permit head taxes but prohibit all other subsection (a) taxes other than head taxes" (Dir. Br. at 30 n.33). This argument is subject to several infirmities. First, if subsection (a) was to be limited to head taxes, Congress would have so stated, rather than enumerating numerous other types of taxes and charges. Second, subsection (c) does not "permit head taxes," it grants a temporary exemption to an airport operating authority from the prohibition of subsection (a) on several enumerated conditions, only a part of one of which is that the exempted charge is a "head tax". The conditions are that the authority be

> collecting (i) without air carrier assistance, (ii) *a head tax*, (iii) on passengers, (iv) in air transportation, (v) for the use of its facilities. (Parentheses, roman numerals and emphasis added.)

These restrictive conditions in no way imply that subsection (a) is limited to a head tax, any more than they imply that subsection (a) is limited to a prohibition of charges for the use of airport facilities or any of the other enumerated conditions. Finally, a comparison of the language of subsection (c) with that of subsection (a) confirms that Congress could distinguish between a statute applicable to only a head tax (the limited subsection (c) exemption) and one applicable to a broad category of state taxes (the subsection (a) prohibition).[6] This suggests that subsection (a) was intended to prohibit a broad class of state taxes including the PSC tax.

2. STATUTORY CONSTRUCTION OF 49 U.S.C. § 1513 BY THE DIRECTOR AND AMICI

Even if the statutory construction of 49 U.S.C. § 1513 by the Director and amici (including that based on the selective analysis of its legislative history) is accepted at face value, the PSC tax as applied to Hawaiian's Passenger Revenues is prohibited by Section 1513(a).

First, the PSC tax as applied to Hawaiian's Passenger Revenues is a "head tax" as the Director defines it (as discussed in footnote 2) and the Director and amici concede that a state "head tax" is prohibited by Section 1513(a).

---

[6]**The language of subsection (c) may explain the position taken in floor debate concerning subsection (c) by Senator Cannon and discussed in States Br. at 23-24 (*i.e.*, subsection (c) as finally drafted may have been intended to apply only to New Hampshire's head tax).**

Second, subsection (a) unquestionably prohibits, among other things, a state tax "on the sale of air transportation or on gross receipts derived therefrom." "Air transportation", as defined in 49 U.S.C. § 1301(10), includes interisland flights in Hawaii.[7] The PSC tax as applied to Hawaiian's Passenger Revenues is a tax on the gross receipts from the sale of air transportation.[8] Nevertheless, the Director concludes (Dir. Br. at 31) that:

> . . . there is no prohibition on taxes or charges on the sale of air transportation in intrastate commerce, which is the sole issue in this case. (Emphasis in the original omitted.)

The Director arrives at this conclusion by ignoring the statutory definition of "air transportation" and making an assumption (Dir. Br. at 31 n.35) as follows:

> It is not reasonable to assume that Congress intended that Section 1513 should be applied to intrastate flights over the Hawaiian islands any differently than to flights in the other forty-nine states.

There is no rule of statutory construction that justifies the disregard of the plain terms of subsection (a) on the basis that it is "not reasonable to assume" that Congress meant what it stated in plain terms. Quite to the contrary, Congress confirmed, in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, that Hawaii interisland flights constitute "interstate or overseas air transportation", by adopting what is now 49 U.S.C. § 1305(b)(2). *See* H.R. REP. NO. 1779, 95th Cong., 2d Sess. 95 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3773, 3805. The States do not join in the Director's assumption or his conclusion. In the States Brief at 17 n. 34 it is stated:

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[7] J.A. at 5, ¶ 5. *Island Airways, Inc. v. CAB*, 352 F.2d 735 (9th Cir. 1965).

[8] J.A. at 15-16, ¶ 5. MTC asserts, without explanation, that "Clearly, the [PSC] tax is not imposed . . . *on the gross receipts derived from the sale of air transportation*." (MTC Br. at 25 n.31). The discussion of the prohibition by the Director (Dir. Br. at 31) and the States (States Br. at 17) as well as by the Appellants and their amici demonstrates that this unexplained assertion is unsupportable.

> . . . a tax on gross receipts (or even measured by gross receipts) would be preempted only if it is on the sale of "air transportation." . . . Though in the instant case before the Court, this definitional test may be met, in many of the *amicus* and other designated states, such as Arizona and Washington, it is not.

Apart from the foregoing, an analysis of the rules of statutory construction applied by the Director and amici further substantiates that the PSC tax on Hawaiian Passenger Revenues is prohibited by the plain terms of Section 1513(a).

A. **The Tenth Amendment.**

The Multistate Tax Commission argues (MTC Br. at 16-17) that "although not raised directly in these cases", the Tenth Amendment "should be considered by this Court in its construction of Section 1513".[9] Apparently, the theory of MTC is that unless the prohibition of Section 1513(a) is limited to "head taxes" or "discriminatory taxes" the prohibition would be unconstitutional under the Tenth Amendment. No one, including MTC, disputes that Congress has the constitutional power to prohibit state taxes with respect to "air commerce" or "air transportation" as defined in 49 U.S.C. §§ 1301(4) and 1301(10), respectively. The Commerce Clause is a specific power granted to the federal government, while the Tenth Amendment is a general reservation to the states of powers not specifically granted to the federal government. Therefore, the Tenth Amendment does not override a federal exercise of a power specifically granted to the federal government in the Commerce Clause.[10]

Thus, Congress is not limited by the Tenth Amendment to the prohibition of specific kinds of state taxes (such as "head taxes" or "discriminatory taxes") with respect to "air commerce" or "air transportation". The scope of prohibition may be determined by

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[9]The States assert (States Br. at 9 n.19): "We incorporate the arguments made by appellee on this issue." The Director has made no such arguments. Only MTC has.

[10]***See Northwestern Electric Co. v. Federal Power Comm'n***, 321 U.S. 119, 125 (1944); ***United States v. Carolene Products Co.***, 304 U.S. 144, 147 (1938). ***See also Evansville-Vanderburgh Airport Authority District v. Delta Airlines***, 405 U.S. 707, 722 (1972); ***Freeman v. Hewit***, 329 U.S. 249, 253 (1946); ***Morgan v. Virginia***, 328 U.S. 373, 378 (1946); ***Southern Pacific Co. v. Arizona***, 325 U.S. 761, 766-67 (1945).

Congress pursuant to power delegated to Congress under the Commerce Clause, subject only to constitutional limits on that power which certainly have not been exceeded in 49 U.S.C. § 1513. Accordingly, the Tenth Amendment does not bear upon the interpretation of the prohibition in 49 U.S.C. § 1513(a).

B. **Federal Preemption.**

The Director asserts, correctly, that it will not be presumed that a federal statute was intended to supersede the exercise of powers by the states unless there is a clear manifestation of intention to do so (Dir. Br. at 29).

This presumption is not, however, a rule of statutory construction that can be applied to emasculate the plain terms of 49 U.S.C. § 1513. In fact, it is the Director and amici who are presuming that Congress did not intend to preempt state taxes that are prohibited by the plain terms of 49 U.S.C. § 1513(a). Arguments with respect to the interpretation of 49 U.S.C. § 1513 premised on claims that state taxes which are prohibited by the plain terms of subsection (a) are not inconsistent with federal policies (*see*, *e.g.*, States Br. at 9-11) or do not duplicate federal taxes (*see*, *e.g.*, Dir. Br. at 12, 32, 35; MTC Br. at 17-19) or are not "discriminatory" (*see*, *e.g.*, Dir. Br. at 8, 12, 13, 36, 43-44; States Br. at 2, 7-9, 12, 22-27), even if such claims are assumed to be correct, are preemption arguments which are not relevant to the meaning of the plain and unambiguous terms of the express prohibition in subsection (a).

Certainly Congress is required to state its intent to preempt state laws clearly and expressly (States Br. at 11-13; N.Y. Br. at 9-11). In this case, it has done so.

C. **The Exemptions of Subsection (b).**

As explained above, subsection (b) of 49 U.S.C. § 1513 by its plain terms exempts "reasonable rental charges, landing fees and other service charges from aircraft operators for the use of airport facilities" from the prohibition of subsection (a). Subsection (b) does not permit, allow or exempt state taxes which are enumerated in subsection (a). The Director and amici construe the phrase in subsection (b) "taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales and use taxes" as permitting, allowing or exempting the enumerated illustrative state taxes (as well as generally applicable state tax laws, generally applicable state business taxes and "nondiscriminatory" state taxes). *See*, *e.g.*, Dir. Br. at 9, 10, 34; States Br.

at 10, 13-16; MTC Br. at 8-10, 19, 25-27; N.Y. Br. at 8-10, 21. This statutory construction of subsection (b) ignores the words in subsection (b) "taxes other than those enumerated in subsection (a)" and violates a cardinal rule of statutory construction that each word in a statute is to be given effect. *See* Hawaiian's Jurisdictional Statement, hereinafter "J.S.", at 13; Hawaiian's Opening Brief, hereinafter "Op. Br.", at 12 n.8. The phrase "taxes other than those enumerated in subsection (a)" is manifestly critical to the meaning of subsection (b). This phrase by its plain terms means that taxes prohibited by subsection (a) (including property taxes, net income taxes, franchise taxes and sales and use taxes if prohibited by subsection (a)) are not permitted, allowed or exempted by subsection (b).

D. **The PSC Tax as a Property Tax.**

The Director argues that the PSC tax as applied to Hawaiian's Passenger Revenues is not prohibited by subsection (a) of Section 1513 because it is a "property tax" expressly "permitted" by subsection (b). Thus the Director states (Dir. Br. at 9):

> It [subsection (b)] expressly permits the states to impose general business and property taxes on airlines, such as property taxes, franchise taxes, net income taxes, and gross receipts taxes.
>
> Admittedly, the PSC Tax is a tax expressly included within subsection (b) because it is reasonably characterized as a property tax. Otherwise, the airlines would not continue to pay this tax less the deductions they claim here.

Subsection (b) by its plain terms does not permit a tax prohibited by subsection (a), no matter how such tax is characterized, including a tax reasonably characterized as a property tax. The Director cites no basis for the purported "admission" that the PSC tax is a "tax expressly included within subsection (b)" (Dir. Br. at 9) because there isn't any.

The Director discusses at some length the "classification" of the PSC tax as a "property tax" by the Hawaii Legislature, Courts and Tax Administrator (Dir. Br. 40-44), all of which is irrelevant. A state tax prohibited by subsection (a) is not permitted under subsection (b) regardless of how it may have been classified by a state legislature or court. A state characterization of a tax cannot be controlling in denying a federal right established by Congress. ***First Agricultural National Bank v. State Tax Commission***, 392 U.S. 339, 347 (1968);

California v. Buzard, 382 U.S. 386, 393 (1966).

It is significant that the Hawaii Supreme Court did not hold that the PSC tax was exempt from the prohibition of 49 U.S.C. § 1513(a) because the PSC tax was classified by Hawaii Courts as a property tax. Rather, the Court held that the application of the PSC tax to Hawaiian's Passenger Revenues was not inconsistent with the purpose of the federal prohibition—a holding which, as is so aptly put in the Brief of the United States (at 6), "ignor[ed] the plain terms of the congressional enactment."

The stipulation with the Director demonstrates the difference between a tax which is prohibited by Section 1513 (a) and a property tax which is not. The State of Hawaii imposes real property taxes for airport system property upon airlines under its airport lease agreements. Hawaiian has paid real property taxes with respect to airport system property (J.A. at 22, ¶ 20) in addition to other real property taxes imposed on Hawaiian's real property (J.A. at 17, ¶ 10). These taxes are not on or measured by gross income or gross receipts.

The PSC tax in both form (as demonstrated by the PSC Tax Return and item 10 of the instructions thereto, J.A. Exhibits D and E) and substance is a tax on gross income. It is not in lieu of property or other taxes except the general excise tax imposed on the gross income of businesses generally. [HAWAII REV. STAT. ch. 237 (1976 & Supp. 1982)]. Section 239-6, HAWAII REV. STAT. (1976), states that the PSC tax is "a means of taxing" personal property of airlines. However, as stated in the dissent below:

> At the present time, . . . Hawaii has no personal property tax as such, and there was none at the time HRS §239-6 was enacted. J.S. App. at A-26.

E. **The Rule of Noscitur a Sociis.**

The Director argues that the rule of *noscitur a sociis* is "significant in interpreting Section 1513" because under this rule the "legislative intent behind a certain word may be established by reference to associated or accompanied [sic] words" (Dir. Br. at 33). The Director applies the rule to the phrase "tax, fee, head charge or other charge" and claims (Dir. Br. at 34) that:

> . . . the *noscitur a sociis* rule demonstrates that Section 1513(a) only prohibits taxes in the category of "head taxes or charges," not a general business tax or property tax like the PSC Tax.

No rule of statutory construction is required to understand the

plain meaning of the words "tax, fee, head charge or other charge". *See* Op. Br. at 10-11; J.S. at 12 n.13. The words "tax, fee" or "other charge" are certainly broader than "head charge"—if Congress had intended to limit subsection (a) to head charge, as alleged, it chose a curious way to do so. Apart from this, the rule of *noscitur a sociis* is applied by the Director to the words "tax, fee, head charge or other charge" not to determine the meaning of these words by associated or accompanying words but to contrive a new phrase that is different from the actual statutory prohibition, *i.e.*, "head taxes or charges".

F. **The Last Antecedent Rule.**

The Director and the States argue that the clause "or on the gross receipts derived therefrom" in the prohibition in subsection (a) means only gross receipts derived from the "sale of air transportation" under the last antecedent rule. (Dir. Br. at 30-31; States Br. at 17 n.34). As stated above, the Director also argues that it is "not reasonable to assume" that the clauses even as so interpreted apply to flights over the Hawaiian islands because this "places form over substance." (Dir. Br. at 31, n.35). Also, as stated above, the States do not join in this assumption, and the assumption is contrary to the federal statute. *See* Op. Br. at 11 n.7.

Under the last antecedent rule relied upon by the Director and the States, a qualifying phrase or clause is to be applied to the words or the phrases immediately preceding the qualifying phrase or clause and is not to be construed as extending to others more remote. *See*, *e.g.*, *United States* v. *Pritchett*, 470 F.2d 455 (D.C. Cir. 1972) (cited in States Br. at 17 n.34).

Under subsection (a) a state tax is prohibited (1) on persons traveling in air commerce or (2) on the carriage of persons traveling in air commerce or (3) on the sale of air transportation or (4) on the gross receipts derived therefrom. The last clause—"or on the gross receipts derived therefrom"—does not qualify (*i.e.*, modify or reduce from a general to a particular or restricted form) any of the preceding three clauses, much less the last antecedent one. That is, the phrase "or on the gross receipts derived therefrom" is by its plain terms a separate and distinct prohibition, not a qualifying one as to any other prohibition. Under its plain terms, the final prohibition, "or on the gross receipts derived therefrom", is in addition to each of the three preceding prohibitions and is not qualified by the words "air transportation" in the last antecedent clause. The argument of the Director and the States that the clause "or on the gross receipts derived

therefrom" is qualified by the words "air transportation" in the last antecedent clause applies the last antecedent rule backwards. That is, the Director and the States argue that the phrase "air transportation" in the last antecedent clause modifies the final clause whereas under the last antecedent rule, if it applies at all, the final clause, if a qualifying clause, modifies the last antecedent clause.

Since the plain terms of subsection (a) do not limit the separate, distinct and final prohibition "or on the gross receipts derived therefrom" to any one of the three preceding prohibitions, that prohibition applies to gross receipts from any of the activities that a state may not tax directly or indirectly under the three preceding prohibitions.

G. **Subject Versus Measure.**

The Director and amici argue that the prohibition in 49 U.S.C. § 1513(a) does not prohibit state general business taxes or property taxes which are measured by gross receipts. *See, e.g.*, Dir. Br. at 29-40; States Br. at 16-17; MTC Br. at 21-25; N.Y. Br. at 4-9, 19-21.

These arguments are premised in part on the proposition stated in sweeping terms by MTC (MTC Br. at 21) as follows:

> A vast difference separates the subject or legal incidence of a tax . . . from the measure of a tax . . . .

As to the matter at issue—the prohibition in 49 U.S.C. § 1513(a)—such a difference, if it exists at all, depends on the language of the federal statute and the intent of Congress.

Because the question here is whether the state tax in question affects a federal statutory immunity, it is clear that for this limited purpose any state's characterization of the state tax in question is irrelevant. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 347 (1968); *Society for Savings v. Bowers*, 349 U.S. 143, 151 (1955).

Certainly there is nothing in the plain terms of 49 U.S.C. § 1513 which indicates the "vast difference" which MTC suggests. To the contrary, the statute prohibits taxes on certain subjects (passengers traveling, carriage of passengers, sale of air transportation) and a measure (gross receipts derived therefrom). Op. Br. at 11.

Subsection (b) of 49 U.S.C. § 1513, as stated above, does not by its plain terms permit, allow or exempt state taxes prohibited by subsection (a). Further, the prohibition in subsection (a) applies to "gross receipts derived therefrom", "directly or indirectly", and

this clause is not limited by its terms or any rule of statutory construction to "air transportation", but applies to gross receipts from any of the activities that a state may not tax directly or indirectly under the three preceding clauses. Thus, an argument that the PSC tax is a "property" tax and is not prohibited because it is measured by gross income [which for purposes of this case is synonymous with "gross receipts" (J.A. at 15-16, ¶ 5; Op. Br. at 14; J.A. at 36-51)] is contrary to the plain terms of 49 U.S.C. § 1513.

The Director and amici assume that subsection (b) exempts all "property" taxes, including a property tax measured by gross receipts, despite its plain terms to the contrary. Because of this assumed exemption of the subject of the tax ("property"), the Director argues that measuring a property tax by gross receipts is not prohibited by subsection (a). But taxes prohibited by subsection (a), regardless of the subject (*e.g.*, property, franchises, sales), are not exempt under subsection (b) if prohibited by subsection (a). Thus, the subject of a tax so measured was not intended to be material in determining the scope of the prohibition. It would be anomalous, at best, to exempt a tax from the prohibition in subsection (a) based upon the purported subject of the tax when subsection (b) demonstrates that Congress did not intend this to be material.

The lack of any substance in the Director's distinction between subject and measure with respect to the prohibition in subsection (a) is clear from other terms of the prohibition. For example, a state tax "on the carriage of persons in air commerce" is prohibited. By its plain terms this applies to a state tax on the person providing such carriage, *e.g.*, an airline. A tax on an airline has to be measured in some way and if it is measured by the "carriage of persons in air commerce"—such as by the number of persons carried or the percentage of the fares charged—it is, in either case, a tax on the carriage of persons in air commerce levied on and collected from the airline. It would not be permitted under the terms of subsection (b) simply because it was labeled a "property" tax.

Finally, the specific exemption in subsection (b) for the levy or collection of reasonable rental charges, landing fees and other service charges from airport operators confirms that the subsection (a) prohibition reaches a measure of taxes or charges (gross receipts derived from the enumerated activities). This is because state charges levied and collected as reasonable rental charges, landing fees and other service charges for the use of airport facilities would not be charges

on any of the activities enumerated in subsection (a). The subject or incident of such charges would be the use of airport facilities. Such charges would be within the prohibition, if at all, only because of their measure; *e.g.*, measured by gross receipts from the sale of air transportation, the carriage of persons or persons traveling in air commerce, directly or indirectly. But if the prohibitions in subsection (a) do not apply to the measure of a tax or charge, then such an exemption would be superfluous. Accordingly, this express exemption confirms Congressional intent to prohibit certain other taxes and charges, such as the PSC tax, by reference to the measure.

For purposes of determining the constitutionality of a state tax under the Commerce Clause a distinction was once made between the subject of the tax and its measure. *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959). In fact, this is the only expressed reason the Hawaii legislature characterized the PSC tax as a property tax.[11] This distinction (or "vast difference") was ultimately recognized for what it was—a distinction based upon labels—and abandoned in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Director and amici urge the resurrection of this discarded distinction.

The distinction between the subject of a tax and its measure was once followed in interpreting Rev. Stat. § 3701 (1878) [current version at 31 U.S.C. § 3124(a) (1983)] prior to its amendment in 1959, prohibiting state taxation of obligations of the United States. *American Bank and Trust Co. v. Dallas County*, 51 U.S.L.W. 5181 (U.S. July 5, 1983). In *American Bank*, however, this Court appeared to criticize this distinction as being "rather formalistic" and lacking any "practical impact" or substantive difference (*id.* at 5183), and refused to apply it in the face of a federal statute which clearly prohibited a state tax. This obsolete distinction would, if applied here, be based upon a premise that the subject of a tax is of controlling significance to the exclusion of its measure. This premise is inappropriate here because the terms of subsection (a) prohibit taxes of subjects and a measure and because the terms of subsection (b) evidence an intent on the part of Congress that this type of distinction should not be material with respect to the prohibition. Also, the plain meaning of 49 U.S.C. § 1513 requires consideration of practical impact in its application, not empty formalism.

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[11] *See* Standing Comm. on Fin., Rep. No. 792 on H.B. No. 57, Hawaii H.R.J., 2d Leg., Gen. Sess. 1963, at 799.

If the Director is allowed to prevail in this case merely by arguing that a state characterization of a tax is effective to destroy an immunity from taxation clearly established by a federal statute, then Section 1513 has been totally emasculated. Any state could characterize any tax as a "property" tax and avoid the federal prohibition in its entirety. Such a result would be particularly gross in this case where the Hawaii characterization of the PSC tax as a property tax is totally artificial.[12]

3. LEGISLATIVE HISTORY

The plain and unambiguous terms of 49 U.S.C. § 1513 make resort to legislative history inappropriate. *See* J.S. at 12 n.13; Op. Br. at 17 n.11. However, the interpretation of 49 U.S.C. § 1513 on the basis of selected portions of its legislative history taken out of context by the Director and amici necessitates a brief response.

The Director discusses the legislative history of the statute at considerable length (Dir. Br. at 11-26) and reaches three conclusions (Dir. Br. at 24-25) as follows:

(1) that Congress was concerned only with taxes "generally characterized in the legislative history as 'head taxes'";

(2) that "[n]othing in the legislative history of Section 1513(a) explains the phrase 'or on gross receipts derived therefrom'";

(3) that "nothing in the Congressional [sic] history of Section 1513 supports *any reason* why the PSC Tax should be held invalid, irrespective of its measure" (emphasis in Dir. Br).

The Director's first conclusion ignores, among other things, a substantial series of specific references to the prohibition of gross receipts taxes in applicable legislative history. There are at least twelve such specific references, which are collected in Appendix A hereto, including the following:

> The committee brings to you a bill which will prohibit the imposition of head taxes or gross receipts taxes by airport

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[12]The PSC tax is not a property tax by its terms or under applicable authorities. *See* Op. Br. Haw. Sup. Ct. 20-24, 26-30, Rec. 202-06, 208-18.

In the House floor debate preceding enactment of the PSC tax, Representative McClung explained "that the bill would put all taxable businesses . . . under one tax statute to get around the problem of inter-state commerce." Hawaii H.R.J., 2d Leg., Gen. Sess. 1963, at 552. As observed in the dissenting opinion of Justice Marumoto of the Hawaii Supreme Court, Hawaii does not have a personal property tax, nor did it have one when the PSC tax was enacted (J. S. App. at A-26).

operators or States. 119 CONG. REC. 13,899 (1973) (statement of Rep. Kuykendall). (Leg. Hist. App. at 168.)

* * *

Our bill of last year did prohibit head taxes, user taxes, gross receipts taxes and other forms of state and local taxation on airline passengers or on the carriage of airline passengers. 119 CONG. REC. 3348 (1973) (statement of Sen. Cannon). (Leg. Hist. App. at 124.)

The Director's second conclusion is erroneous in light of these specific references, and pointless since it ignores the plain and unambiguous terms of the phrase (Dir. Br. at 31-32).

The Director's third conclusion is specious. As aforesaid, the legislative history includes various statements of the reason for the prohibition of taxes such as the PSC tax by 49 U.S.C. § 1513(a) (*i.e.*, protection, directly and indirectly, of the revenue base that was the source of airport and airway trust funds). The 1972 Senate Debate is illustrative.

Finally, Mr. President the committee bill prohibits State and local taxation of air fares. The Commerce Committee and the Congress intended in 1970 to preempt the states and localities from levying such taxes, as taxation on air fares is one of the predominant sources of revenue for the trust fund. 118 CONG. REC. 27,816 (1972) (statement of Sen. Pearson). (Leg. Hist. App. at 78.)

The conclusion of the Director and amici that the prohibition in 49 U.S.C. § 1513(a) which applies to a "tax, fee, head charge, or other charge" means "head taxes" or "user charges" (Dir. Br. at 25; States Br. at 18-22; MTC Br. at 11-16; N.Y. Br. at 14-15) is contrary to its plain terms and is unsupportable on the basis of its legislative history as aforesaid. As detailed in Hawaiian's Jurisdictional Statement (at 13-16), the legislative history clearly demonstrates that "head charges" were *added* to an existing, expanded enumeration of the prohibited taxes in 49 U.S.C. § 1513(a). The addition was in response to the Court's constitutional approval of head taxes in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972). The addition of "head charges" to the prohibition was not intended to limit, and by its plain terms does not limit, the prohibition, but rather expands it.

The Director and amici also argue that the legislative history of 49 U.S.C. § 1513(a) indicates that Congress also intended to prohibit only "discriminatory" state taxes. The basis for this argument is testimony of the Ohio Deputy Tax Commissioner in the legislative history regarding an airlines excise tax of the State of Ohio (Dir. Br.

at 12-14, 35; States Br. at 22-28; MTC Br. at 16-17; N.Y. Br. at 15-18).[13] When Congress has intended to prohibit only "discriminatory" state taxes, it has expressly so provided (*see, e.g.*, 31 U.S.C. § 3124(a) and 49 U.S.C. § 1513(d)), and the prohibition in Section 1513(a) contains no such limitation. In any case, the testimony of the Ohio Deputy Tax Commissioner was to the effect that the Ohio tax was *not* discriminatory but "fair, reasonable, and necessary" and neither "excessive" nor "burdensome". *See* Leg. Hist. App. at 145-46.[14] This testimony was given in conjunction with an unsuccessful effort to have gross receipts taxes, such as the Ohio airlines excise tax, excluded from the prohibition of 49 U.S.C. § 1513(a).

CONCLUSION

The interpretation placed upon the prohibition in 49 U.S.C. § 1513(a) by the Director and amici substantially nullifies its plain and unambiguous terms. The interpretation is not warranted by any rule of statutory construction correctly applied. The interpretation is not supported by the legislative history. The interpretation, if allowed to stand, will open the floodgates of state taxation of air commerce and undermine the federal statutory scheme of taxation and support to airport and airway development.

Respectfully submitted,

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[13] An alternate basis in N.Y. Br. at 17 and States Br. at 26 is a reference to the testimony of Stuart G. Tipton, Chairman, Air Transport Association of America (Leg. Hist. App. 133-41). However, Mr. Tipton characterized the subject Ohio gross receipts tax as discriminatory because it reached revenues already subject to the federal excise taxes, not because the tax applied to airlines only. Leg. Hist. App. at 137.

[14] The Ohio Deputy Tax Commissioner noted that in Ohio most businesses paid both franchise and personal property taxes, that the airlines, although subject to both taxes paid small personal property taxes and that the Ohio tax was enacted to make up for this minimal taxation of airlines by Ohio compared with railroads or the trucking industry. Leg. Hist. App. at 145.

APPENDIX A
Legislative History References to Prohibition of Gross Receipts Taxes

The legislative history of 49 U.S.C. § 1513 includes, among other things, at least twelve (12) specific references to the prohibition of gross receipts taxes. These references are quoted or collected below.

1. COMMITTEE REPORTS

Section 7 of the bill adds a new Section 1113 to the Federal Aviation Act of 1958 prohibiting any tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or on the carriage of persons in air transportation or on the gross receipts derived therefrom. The bill allows, however, for the continuation of the levy and collection of reasonable rental charges, landing fees, and other service charges for the use of airport facilities. However, State jurisdictions meeting certain criteria established in the bill are given until July 1, 1973 to comply with the prohibition. SENATE COMM. ON COMMERCE, AMENDING THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970 AND THE FEDERAL AVIATION ACT OF 1958, S. REP. NO. 12, 93d Cong., 1st Sess. 6 (1973), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 1434 (Leg. Hist. App. at 111).

Section 7 of the Senate Bill provided for a permanent prohibition against the levy or collection of a tax or other charge on persons traveling in air commerce, or on the carriage of persons so traveling, or on the sale of air transportation or on the gross receipts derived therefrom, by any State or political subdivision thereof (including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, or political agencies of two or more States). CONFERENCE REPORT, AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973, H.R. REP. NO. 225, 93d Cong., 1st Sess. 5 (1973) (Leg. Hist. App. at 182).

See SENATE COMM. ON COMMERCE, AMENDING THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970, S. REP. NO. 1005, 92d Cong., 2d Sess. 7 (1972) (Leg. Hist. App. at 65); CONFERENCE

REPORT, AIRPORT DEVELOPMENT ACCELERATION ACT OF 1972, H. REP. NO. 1543, 92d Cong., 2d Sess. 5 (1972) (included in part in Leg. Hist. App. at 93, this statement omitted).

2. FLOOR DEBATES

. . . Finally, our bill prohibits discriminatory State and local taxation on airline passengers and on the gross receipts derived from air transportation. 119 CONG. REC. 18,045 (1973) (statement of Sen. Cannon) (Leg. Hist. App. at 187).

. . . Mr. Speaker, I rise in support of the conference agreement on S. 38, the Airport Development Acceleration Act of 1973.

The House amendment to S. 38 was passed by this body by an overwhelming vote of 386 to 16 on May 2. The purpose of the bill was twofold—to prohibit the imposition of head taxes or gross receipts taxes by airport operators or States, and at the same time to increase the Federal share of funding for airport projects in medium hub and smaller cities to alleviate the problems that these cities have had in coming up with the local share. 119 CONG. REC. 17,344 (1973) (statement of Rep. Devine) (Leg. Hist. App. at 186).

Finally, Mr. President, S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The bill prohibits the levying of State or local head taxes, fees, gross receipts taxes or other such charges either on passengers or on the carriage of such passengers in interstate commerce. 119 CONG. REC. 3349 (1973) (statement of Sen. Cannon) (Leg. Hist. App. at 125-26).

See 119 CONG. REC. 13,899 (1973) (statement of Rep. Kuykendall) (Leg. Hist. App. at 168; quoted in text), 119 CONG. REC. 3348 (1973) (statement of Sen. Cannon) (Leg. Hist. App. at 124; quoted in text).

3. HEARINGS

Particularly dangerous, burdensome, and discriminatory in our judgment is one State's imposition of a tax on the gross receipts derived from the sale of interstate air

transportation—a so-called airlines excise tax. This tax is levied at a rate of 4 percent on airline receipts in that State "for the privilege of engaging in the business of transporting persons or property by air." The revenue derived from this tax is used for projects totally unrelated to aviation. Furthermore, it is levied only on airlines. Airlines pay all other taxes generally applicable to business in the State, and yet they and their passengers are being singled out as an easy source of revenue, whether or not airline operations in the State are profitable, and regardless of their general tax burden. Thus, Pandora's box has been opened to another form of discriminatory taxation on air transportation which, if allowed to proliferate in a myriad of possible forms, could deal a severe financial blow to air travelers as well as the airlines.

. . . .

A more important point, possibly a more basic point, is the discriminatory character of such taxes. Of course, a common characteristic of this tax and the head tax is their discriminatory nature. Either tax, if enacted throughout the country would impose additional financial burdens on air travelers, who are already paying Federal taxes which were established when it was widely assumed that such State and local taxes could not be constitutionally imposed. Both seem to be convenient vehicles for unwarranted taxation of air travelers and air commerce for nonaviation purposes, or for projects which do not necessarily benefit the airports where users are taxed. These taxes can easily be escalated, and if allowed to go unchecked, pose a hazard of disrupting the national system ultimately. The best way to avoid this is to prohibit these taxes again, as you did in the bill which you passed last session. No State or locality which would seek to levy these taxes for nonaviation purposes has a legitimate claim to them. In those cases where communities are relying on head taxes to provide the revenue needed to fund airport improvements, it should not be necessary since as you recognized last year, the airport program can be adjusted to make the user charge revenues in the trust fund more available to the communities who need assistance. *Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182 and S.38 Before the*

Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 96 (Mar. 14, 15, 20, 22, & 27, 1973) (statement of Stuart G. Tipton, Chairman, Air Transportation Assn. of America) (Leg. Hist. App. at 135, 137).

> In addition to the "head tax" on airline passengers, a new and even more dangerous concept has now appeared—the "gross receipts" tax on airline revenues. Unless Congress acts promptly and effectively, these burdensome taxes will continue to proliferate, and will cause serious economic injury to the air transport industry and its users. *Id.* at 101-03 (statement of Edward J. Driscoll, President, National Air Carriers Assn.) (Mr. Driscoll's testimony is omitted from Leg. Hist. App., although his name is referenced therein at 141).

See id. at 246 (statement of Theodore Koetz, Deputy Tax Commissioner, State of Ohio) (Leg. Hist. App. at 146-48, 151, 153); *id.* at 260 (statement of John A. Nammack, Exec. V.P., Nat'l Assn. of State Aviation Officials) (Leg. Hist. App. at 157).

Other portions of the legislative history evidence an intent to prohibit a broad category of state taxes through enactment of 49 U.S.C. § 1513. *See* 118 CONG. REC. 27,812-29 (1972) (Leg. Hist. App. at 78-79); Op. Br. at 22-24; J.S. at 13-17.

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No. 82-585
No. 82-586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALOHA AIRLINES, INC.,
Appellant,

—v.—

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

HAWAIIAN AIRLINES, INC.,
Appellant,

—v.—

DIRECTOR OF TAXATION OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-585
No. 82-586

ALOHA AIRLINES, INC.,

Appellant,

—v.—

DIRECTOR OF TAXATION, STATE OF HAWAII,

Appellee.

HAWAIIAN AIRLINES, INC.,

Appellant,

—v.—

DIRECTOR OF TAXATION OF THE STATE OF HAWAII,

Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AIR TRANSPORT ASSOCIATION OF AMERICA

Air Transport Association of America ("ATA"), an association whose 31 members include the major domestic airlines, submits this brief in support of appellants with the written consent of all parties to these appeals, pursuant to Rule 36.2 of the Rules of this Court.

Hawaii's gross receipts tax, which is the subject of this appeal, is in the opinion of the ATA directly prohibited by 49 U.S.C. § 1513, which bars State taxation of air carriage or of the gross receipts therefrom. Unless the Court so rules on this appeal, ATA members may face a proliferation of similar State taxes.

The ATA has successfully challenged a New York tax on airline gross receipts in *Air Transport Association of America v. New York State Department of Taxation & Finance*, No. 11450-81 (Sup. Ct. Albany Co. June 10, 1982), *aff'd*, No. 43719 (App. Div. 3d Dep't Jan. 20, 1983). (Copies of the unreported decisions in that case are Appendix A hereto.) The Appellate Division's decision is currently on appeal to the New York Court of Appeals.

These State taxes are, and others if permitted will be, a serious burden on ATA member airlines, and the ATA therefore has a major interest in the present appeals which seek to invalidate the Hawaii tax.

SUMMARY OF ARGUMENT

Section 1513 is one part of a comprehensive Federal program to develop and improve the nation's airports and airways. To implement that program, Congress, in 1970, provided for increased Federal assistance to the States in funding airport and airway development, with additional Federal funds to be obtained by new and increased Federal aviation taxes. Section

1513 was enacted in 1973 to prohibit the States from imposing additional taxes on the same gross receipts on which some of the Federal taxes were based. Both the language of Section 1513 and its legislative history make this clear. The court below misread both that language and the legislative history.

In order to protect airlines from the State gross receipts taxes prohibited by Section 1513, the Court should reverse the decision below and hold that the Hawaii tax is invalid.

ARGUMENT

I.

The Legislative Background of Section 1513.

In 1970, Congress enacted "a comprehensive program substantially to expand and improve the national airport and airway system." *Massachusetts v. United States*, 435 U.S. 444, 447 (1978). The program included two statutes. The Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 ("Development Act"), established the Airport and Airway Trust Fund and provided for greatly increased Federal expenditures for airport and airway development. A companion statute, the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236 ("Revenue Act"), provided for new and increased aviation taxes to help pay for such expenditures. These taxes were

> "an 8% tax on the price of domestic air passenger tickets, see Revenue Act, § 203, 26 U.S.C. § 4261; a $3 'head tax' on international flights originating in the United States, *ibid.*; and a 5% tax on the cost of transporting property by air, Revenue Act, § 204, 26 U.S.C. § 4271."

Massachusetts v. United States, supra, 435 U.S. at 451. These taxes were "designed to serve the congressional policy of having those who especially benefit from Government activity help bear the cost." *Id.* at 448.

In 1973, Congress supplemented the 1970 legislation by enacting the Airport Development Acceleration Act, Pub. L. No. 93-44, 87 Stat. 88 ("Acceleration Act"). This statute increased the Federal share of airport funding. As part of the Acceleration Act, Congress added a new section, 49 U.S.C. § 1513, to the Federal Aviation Act in order to prohibit the States from imposing taxes on the same air carrier receipts on which the Federal taxes were based. Congress felt that such additional State taxes would be "inimical to the development of a national system funded in large part by uniform federal taxes." S. REP. NO. 12, 93d Cong., 1st Sess. 26 (1973), *reprinted in* 1973 U.S. CODE CONG. & ADM. NEWS 1455. Senator Cannon observed that such State taxation was a "form of double taxation which we did not intend when, in 1970, we enacted a national system of aviation user taxation." 119 CONG. REC. 3349 (1973).

II.

Section 1513 Expressly Prohibits State Taxes on Gross Receipts from Air Carriage.

Section 1513 states as clearly as language can that the States are prohibited from taxing air carriage or the gross receipts from air carriage. It provides:

> "(a) No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . . ."

This language covers virtually every conceivable method by which a State or local government might attempt to tax air carriage or the gross receipts therefrom and thus add more taxes on top of the Federal tax.

First, Congress made certain that it reached all forms of levy by specifically prohibiting any "tax" (normally a percentage of a certain amount), any "fee" (normally a flat amount per unit of measure), and any "head charge" (a fee per person). It then added the words "other charge" to further ensure against evading the prohibition by a resort to some other label.

Second, Congress broadly defined the subjects which States cannot tax. It prohibited any tax, fee, or charge (1) on "persons traveling in air commerce", or (2) on "the carriage of persons traveling in air commerce", or (3) on the "sale of air transportation", or (4) on "the gross receipts derived therefrom".

Third, Congress extended this prohibition to taxes, fees, head charges, or other charges that are "*directly or indirectly*" on such persons, carriage, sales or gross receipts, thereby barring levies, however characterized, on the same receipts subject to the Federal tax. Indeed, the "directly or indirectly" language is so broad that a tax on an airline's net income, capital stock, surplus or property might be considered a tax "indirectly" on air carriage or the gross receipts therefrom. To make clear that these other State taxes were not prohibited, Congress added subsection (b) to Section 1513. It provides:

> "(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a)* of this section, including property taxes, *net* income taxes, franchise taxes and sales or use taxes on the sale of goods or services . . . ." (Emphasis added)

The words "other than those enumerated in subsection (a)" show that subsection (b) does not affect the prohibitions of subsection (a) but merely explains that other types of taxes are not barred. For example, subsection (b) provides that "net income taxes" are permissible, which only emphasizes that gross receipts taxes are not. There would have been no need to include in subsection (b) any description of taxes by measure if

subsection (a) had not prohibited taxes by measure—*i.e.*, gross receipts taxes.

Subsections (a) and (b) therefore are entirely consistent with one another. Subsection (a) clearly bars all State taxes on gross receipts from air carriage. It does so without regard to what the tax is called or how it is labelled by the State. On the other hand, other State taxes, including the types of taxes mentioned in subsection (b), are not prohibited as long as they are not levied on gross receipts and thus do not duplicate the Federal tax.

In holding that Hawaii's gross receipts tax was not prohibited by Section 1513, the court below misread the language of the statute. In interpreting subsection (b), it ignored the "other than" phrase, and mistakenly concluded that there were "seeming contradictions" between subsections (a) and (b) when in fact the subsections are harmonious. J.S. App. 9.[1]

III.

The Legislative History of Section 1513 Shows that Congress Intended to Prohibit State Taxes on Gross Receipts from Air Carriage.

Section 1513's prohibition on State taxation is clear and unambiguous and therefore should be enforced according to its terms. "The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention." *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, ___ U.S. ___, 51 U.S.L.W. 4195, 4197 (Feb. 23, 1983).

On January 6, 1971, shortly after the enactment of the Development Act and the Revenue Act, the first version of what later became Section 1513 was introduced in the House by Congressman Moss. This bill, H.R. 2337, 92d Cong., 1st Sess. (1971), provided in relevant part:

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1 References in this form are to the Appendix to the Jurisdictional Statement in No. 82-585.

> "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation . . . ."

No action was taken on the bill in 1971.

In the spring of 1972, Congress began a review of airport funding under the 1970 legislation. On April 19, 1972, shortly after the Senate began hearings, this Court held in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), that the Development Act did not prevent States from imposing "head taxes" on air passengers or on air carriers. That decision, coming in the midst of Congress's review of airport development funding, focused attention on the need to prohibit State head taxes as well as other taxes on the same revenues subject to the Federal tax.

On May 9 and 16, 1972, Congressman Adams, for himself and others including Congressman Moss, introduced two identical bills, H.R. 14847 and 14991, 92d Cong., 2nd Sess. (1972). They were the same as Congressman Moss' 1971 bill except that the language underscored below was added:

> "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, *on persons traveling in air transportation or* the carriage of persons in air transportation. . . ." (Emphasis added)

The underscored language was in response to the *Evansville* decision and broadened the prior bill to prohibit head taxes.

In the meantime, on May 16, 1972, Senator Cannon introduced in the Senate a State tax prohibition bill, S. 3611, 92d Cong., 2d Sess. (1972), which in relevant part was identical to Congressman Moss' 1971 bill.

On June 27, 1972, Senators Cannon and Magnuson introduced S. 3755, 92d Cong., 2d Sess. (1972), which dealt comprehensively with airport development funding. Included in that bill was the following new version of the State tax prohibition:

> "No State (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or the carriage of persons in air transportation, *or on the gross receipts derived therefrom*, provided, however, that nothing herein shall prohibit a State (or any political subdivision thereof) from the levy or collection of taxes *other than those enumerated above*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services (*other than on the sale of interstate air transportation or any portion thereof*); and further provided, that nothing herein shall prohibit a State (or political subdivision thereof) owning or operating an airport from the levy or collection of reasonable rental charges, landing fees, and other service charges for the use of airport facilities (*measured on other than a per-passenger basis*)." (Emphasis added)

The phrase "or on the gross receipts derived therefrom" was added after a Senate subcommittee on Aviation of the Committee on Commerce had heard testimony from Whitney Gilliland, Vice Chairman of the Civil Aeronautics Board. *Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S. 2397, S. 3302, S. 3611, and S. 3755 Before the Subcomm. on Aviation of the Senate Committee on Commerce*, 92d Cong., 2d Sess. (April 25-June 12, 1972). He called the subcommittee's attention to an Ohio tax that was denominated a privilege tax, but was based on "the gross receipts of airline business done in Ohio." *Id.* at 137. It seems clear that the new language prohibiting taxes on "gross receipts" was included for the specific purpose of barring taxes like the Ohio gross receipts tax. Just as Congress had broadened the scope of the prohibition to cover head taxes in reaction to *Evansville*, it further broadened the prohibition to cover gross receipts taxes after learning of the Ohio tax.

The "other than those enumerated" language also appeared for the first time in S. 3755. This language and the lines

following, with some modifications, ultimately became subsection (b). A common-sense reading of the proviso, as it originally appeared in the same sentence as the prohibitory language, compels the conclusion that it was intended merely to clarify that State taxes which did not duplicate the Federal tax were not prohibited.

The language permitting "sales or use taxes on the sale of goods or services (other than on the sale of interstate air transportation or any portion thereof)" further demonstrates that the only permissible sales taxes were those which were *not* on the sale of air transportation itself—and therefore did not duplicate the Federal tax. Similarly, the final clause providing that States could levy reasonable service charges for the use of airport facilities also expressly stated that such charges could not be measured on "a per-passenger basis"—that is, could not be measured in a way that amounted to a prohibited head tax. In short, this draft of the bill abundantly demonstrates that the proviso language which became subsection (b) was never intended to undermine subsection (a)'s prohibitions.

S. 3755 was considered by the Senate Committee on Commerce in executive session on June 28, 1972, and "favorably reported with one substantive and numerous technical or drafting amendments." S. REP. NO. 1005, 92d Cong., 2d Sess. 7 (1972). The Committee Report explained that the only substantive amendment related to airport development grants, which are irrelevant for our purposes, and that all the other amendments were of a "technical or drafting nature and do not reflect substantive changes in the bill." *Id.* The "technical or drafting" changes, insofar as they related to what became Section 1513, included dividing the single paragraph into subsections (a) and (b), eliminating the last two parenthetical "other than" phrases and adopting language which is the same as the law that was finally enacted a year later, in June 1973.[2] As stated, the Committee Report explains that these were

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2 These changes were made in an amended S. 3755, 92d Cong., 2d Sess. (1972), which was introduced on August 1, 1972.

technical or drafting changes; if dropping the parenthetical phrases had been intended as substantive changes, that undoubtedly would have been fully explained in the Committee report. The parenthetical phrases were undoubtedly eliminated as redundant in view of the prior "other than" language in the bill.

There were no further changes in this section prior to its enactment as Section 1513 a year later, in June 1973. On October 5, 1972, a Conference Report stated that the Senate version of the bill was acceptable to the House. H.R. REP. NO. 1543, 92d Cong., 2d Sess. 3 (1972). The bill was passed, but pocket-vetoed by President Nixon on October 27, 1972.[3]

When the 93rd Congress convened in January 1973, several Congressmen included this prohibition in various bills, H.R. 4082, H.R. 2695, H.R. 4182, H.R. 4213, and H.R. 4214, 93d Cong., 1st Sess. (1973). In the Senate, virtually the same bill that had been S. 3755 was introduced as S. 38, 93d Cong., 1st Sess. (1973). On February 5, 1973, Senator Pearson explained S. 38 as follows:

> "Finally, Mr. President, the committee bill prohibits State and local taxation of air fares. The Congress intended in 1970 to preempt the States and localities from levying such taxes, as taxation on air fares is one of the predominant sources of revenue for the trust fund. Recent Supreme Court decisions necessitate the clarification of this congressional policy determination.
>
> "If more than 500 localities—or even a significant proportion of this number—were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce."

119 CONG. REC. 3350 (1973).

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3 The pocket veto was of the entire Acceleration Act, for reasons unrelated to Section 1513. *See* 119 CONG. REC. 3348, 3350 (1973).

In March 1973, a House subcommittee held hearings on the airport development aid program. *Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. (March 14-27, 1973). Once again, the Ohio tax on gross receipts was brought to Congress's attention. Theodore Koetz, Deputy Tax Commissioner of Ohio, testified in an effort to exempt Ohio's gross receipts tax on airlines from the prohibition. He proposed that the language underscored below be added to subsection (b) in order to permit State gross receipts taxes if they were fairly apportioned to a particular state:

> "(b) Nothing herein shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, sales or use taxes on the sale of goods or services, *privilege or excise taxes, and gross receipts taxes fairly apportioned to a State* . . . ." (Emphasis added)

Id. at 248-49.

This suggestion was not adopted. Once again, its rejection of the Ohio proposal shows that Congress intended to bar any tax on gross receipts from air carriage—no matter what that tax might be labelled or how it might be characterized. The discussion before the House subcommittee included the following:

> "MR. SHOUP. One final question, Mr. Chairman.
>
> "I was interested in your answer to Mr. Dingell's question, whether this was a gross receipts tax. I fail to understand why this is not a gross receipts tax.
>
> "MR. KOETZ. Well, we start off with the total gross receipts of the airline and then break them down only to the in and out of Ohio's portion.
>
> "MR. SHOUP. But it is based on the gross receipts?

"MR. KOETZ. It is based on the gross receipts attributable to Ohio, origination-destination.

"MR. DINGELL. If the gentleman will yield: then it is a gross receipts tax. *It either is an excise tax or it is a gross receipts tax. And I do not think calling it an excise tax is going to make it; so, to be perfectly frank with you.* This is either an excise tax or a gross receipts tax.

"*So really, you have a gross receipts tax*, and the only difference between this and a regular gross receipts tax, for example, on an airline doing business, would be that you would simply say: 'OK fellows, we are only going to charge you on that portion of the business which is done inside the State of Ohio.'

"But the Federal Constitution would prohibit you from levying a tax on business that is done outside the State of Ohio anyway." (Emphasis added)

Id. at 251-52.

In commenting on the Ohio Tax, Congressman Shoup stated:

"I think the problem we have here on the committee on the head tax is not the fact that revenues being raised for a very needed use, but the fact that we made these decisions some years ago that we would take a national view of it, not individual.

And it would seem to me that this type of tax [referring to the Ohio tax] does not differ from a head tax; that each State and each community, if we can justify Ohio's, would be able to add their own excise tax, which I can't see differs from a head tax."

Id. at 250.

After the House hearings, the State tax prohibition as proposed in S. 38 was passed by Congress and signed by the President on June 18, 1973.

The court below did not take account of this legislative history. It concluded that Section 1513 was enacted "in response to" the head taxes held permissible in *Evansville*, J.S. App. 8, and it apparently further concluded that Section 1513 prohibited taxes imposed on passengers but not on airlines. J.S. App. 15-17. Neither of these conclusions is correct. The bill that became Section 1513 had been introduced *before* the *Evansville* decision and was later expanded to prohibit head taxes following *Evansville*. Nor was it limited to taxes imposed on passengers. On the contrary, it explicitly prohibits taxes on air carriage and on gross receipts from air carriage.

IV.

State Taxes on Gross Receipts from Air Carriage Undermine the Purpose of Section 1513.

Appellee has argued that the Hawaii tax is valid because it can be characterized as a "property tax". That characterization, whether or not it correctly describes Hawaii's purpose in enacting the tax, does not permit the Hawaii tax to escape the prohibition of Section 1513. The tax is based on gross receipts, it rises and falls with gross receipts, and if there are no gross receipts there is no tax. Whatever else it may purport to be, the Hawaii tax is also a tax on gross receipts and is therefore barred by Section 1513.

The label by which a State describes a tax is not the test under Section 1513. Congress certainly did not intend that a tax labelled a "franchise tax" or a "privilege tax" or a "sales tax" or a "property tax" could by its label avoid the prohibition of subsection (a) if it was based on gross receipts. If that were possible, subsection (a) would be essentially nullified by subsection (b).[4]

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4 *Cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977) (where the issue is whether a State tax unconstitutionally burdens interstate commerce, the tax is examined according to its impact, not its label).

Finally, subsection (a)'s prohibition of State gross receipts taxes is logical, fair and consistent with the entire Federal funding program. The Federal taxes collected under the 1970 legislation are not lost to the States; instead, they are deposited in the Trust Fund, from which they are distributed for use in the development and improvement of airports and airways. The Federal government is simply a collector and distributor for the benefit of the States. In requiring these Federal taxes to be paid, it was fair and logical for Congress to prohibit the States from imposing duplicate taxes on the same gross receipts. Section 1513 clearly expresses that Congressional purpose and the States should not be permitted to flout it.

CONCLUSION

For the foregoing reasons, the ATA respectfully requests that the Court reverse the decision of the Supreme Court of Hawaii, and hold that Hawaii's tax on gross receipts from air carriage is prohibited by Section 1513 and is therefore unconstitutional under the Supremacy Clause.

Respectfully submitted,

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March 11, 1983

Opinion of
New York Supreme Court,
Appellate Division,
Third Department, in
Air Transport Association of America v. New York State Department of Taxation and Finance, et al., No. 43719
(January 20, 1983)

Before Honorable T. Paul Kane, Justice Presiding,
Honorable Ann T. Mikoll,
Honorable Paul J. Yesawich, Jr.,
Honorable Leonard A. Weiss,
Honorable Howard A. Levine, Associate Justices

Opinion of the Court per Kane,
Justice Presiding:

Plaintiff is an unincorporated trade and service association consisting of 31 air carriers, 21 of whom do business in New York State. In this declaratory judgment action, plaintiff contends that section 184 (subd. 1) of the New York State Tax Law imposes a tax that is prohibited by section 1113 of the Federal Aviation Act (U.S. Code, tit. 49, § 1513) and is, therefore, unconstitutional under the supremacy clause (art. VI, cl. 2) of the United States Constitution.

Section 1113 of the Federal Aviation Act provides, in pertinent part, that:

> (a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, *directly or indirectly*, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* * * * (emphasis added).
>
> (b) Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those

> enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *.

Section 184 (subd. 1) of the Tax Law provides, *inter alia*, that:

> Every corporation * * * formed for or principally engaged in the conduct of aviation * * * for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, *shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state* (emphasis added).

Special Term found that section 184 (subd. 1) of the Tax Law, while called an "additional franchise tax", was, *inter alia*, "in fact a tax upon the gross receipts from sale of air transport services" and that section 1113 of the Federal Aviation Act forbids such a tax. This being the case, Special Term declared section 184 (subd. 1) of the Tax Law unconstitutional. This appeal ensued.

Defendants' central argument is that the gross earnings of section 184 (subd. 1) are not entirely composed of gross receipts from the sale of air coverage, but have other components. As such, defendants assert that the franchise tax in question, which includes gross receipts in its measurement, is permissible and, therefore, not in conflict with section 1113 since subdivision (b) of that section explicitly permits the levy of franchise taxes.

This argument must be rejected. In our opinion, the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts

derived from air transportation. Moreover, legislative history, evidenced by the various forms of the bills and hearing testimony, supports our reading of section 1113 of the Federal Aviation Act. In particular, Congress refused to adopt a suggestion by the State of Ohio to add language to subdivision (b) of section 1113 which would have permitted State taxation of fairly apportioned air carrier gross receipts (see Hearings Before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Congress, First Session).

In November, 1973, the Ohio Attorney-General issued an opinion declaring the Ohio excise tax discussed above to be in conflict with section 1113, as that section "prohibits both direct and indirect state taxation of the sale of air transportation" (Ohio Attorney-General Opn. No. 73-117). We would also note that the Court of Appeals of Arizona has held that a transaction privilege levy imposed by Arizona on air carriage measured by gross receipts of sales was impermissible as it conflicted with, and was thus preempted by, section 1113 (*State ex rel. Arizona Dept. of Revenue v. Cochise Airlines*, 626 P. 2d 596 [Ariz.]).

Defendants argue that the New York franchise tax challenged herein is distinguishable from both the Ohio tax and Arizona tax. We, however, are unable to find any meaningful distinction. The language of section 184 (subd. 1) also refers to "privilege", and defendants' argument that the measurement of the challenged tax by gross earnings is distinguishable from a direct tax on gross receipts is without substance. In this regard, the fact that section 184 (subd. 1) of the Tax Law imposes a tax on other categories of income does not alter the fact that it imposes a tax upon the gross receipts derived from air carriage.* Finally, defendants' contention that to construe the Federal statute as prohibiting the use of gross receipts in determining franchise taxes would render meaningless the ex-

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* Plaintiff does not challenge the tax on other categories of income.

plicit provision in section 1113 (subd. [b]) permitting the levy of franchise taxes by States is specious, since the measurement for the franchise tax could be structured in a different way (but see *Matter of Aloha Airlines, Inc.*, 647 P. 2d 263 [Hawaii], U.S. S. Ct. app. pending).

We would, therefore, agree with Special Term that section 184 (subd. 1) of the Tax Law is preempted by the subject Federal statute insofar as gross earnings are measured by gross receipts from air carriage. Special Term's judgment must, therefore, be affirmed.

The judgment should be affirmed.

Decision on Reargument

Memorandum Decision of
New York Supreme
Court, Albany County, in
Air Transport Association of America
v. New York State Department of
Taxation and Finance, et al., No. 11450-81
(June 10, 1982)

Memorandum Decision of
Justice De Forest C. Pitt:

The plaintiff, the Air Transport Association of America, has moved for reargument of the decision and order of this Court which found application of section 184 of the New York Tax Law constitutional and not within the prohibition of section 1113 of the Federal Aviation Act.

This Court found that section 184 of the Tax Law was in fact a tax upon the gross receipts from the sale of air transport services. The Court looked to the legislative history to determine that such tax was not barred by the Federal Aviation Act because the tax was not in any way discriminatory. Upon reargument the plaintiff has shown that the Court misinterpreted section 1113 of the Federal Aviation Act. In its original decision the Court held that if sales taxes were allowed on the sale of air transportation then certainly franchise taxes would be allowed. The Court then looked at the problems which section 1113 of the Federal Aviation Act addressed and determined that since section 184 of the Tax Law was not discriminatory that it would not be barred by said section.

The legislative drafting history of section 1113 of the Federal Aviation Act clearly shows that Congress did not intend to allow sales taxes on the sale of air transportation. Furthermore, such drafting history shows that the language of subdivision b of section 1113, which states "nothing herein shall prohibit a state . . . from the levy or collection of taxes *other*

than those enumerated in subsection (a) of this section," (emphasis added) was intended to bar any type of tax based upon the gross receipts derived from the sale of air transportation.

Since this Court mistakenly implied a requirement that taxes be discriminatory to be barred by section 1113 of the Federal Aviation Act and since it is now determined from the legislative history that said section imposes an absolute bar on any taxes upon gross receipts from the sale of air transportation, it is the determination of this Court that section 184 of the New York State Tax Law is in violation of such prohibition and is unconstitutional pursuant to the supremacy clause of the United States Constitution.

The plaintiff's motions for reargument and for summary judgment declaring that subdivision (1) of section 184 of the New York State Tax Law unconstitutional are therefore granted in all respects.

Submit order.

Initial Decision

Memorandum Decision of
New York Supreme
Court, Albany County, in
Air Transport Association of America
v. New York State Department of
Taxation and Finance, et al., No. 11450-81
(April 15, 1982)

Memorandum Decision of
Justice De Forest C. Pitt:

The plaintiff, The Air Transport Association of America, an unincorporated trade and service association consisting of 31 air carriers, has moved for summary judgment declaring subdivision 1 of section 184 of the New York Tax Law unconstitutional insofar as it seeks to tax the gross receipts of plaintiff's member air carriers.

The defendants have raised the issue of whether the plaintiff association has standing to challenge section 184 of the Tax Law because it does not pay any taxes pursuant to said section. However, the complaint alleges that the association members are subject to the tax and have paid such tax and that such taxes amount to millions of dollars each year. These allegations are sufficient to give the plaintiff standing to sue (*Boston Stock Exchange v. State Tax Com.* 429 U.S. 318).

The complaint alleges that subdivision 1 of section 184 of the Tax Law violates the supremacy clause of the United States Constitution because said section of the Tax Law imposes a tax upon the gross receipts from the sale of air transport services in violation of section 1113 of the Federal Aviation Act (49 U.S.C. section 1513). This section of the Federal Aviation Act prohibits the states from levying or collecting taxes based upon the gross receipts derived from the sale of air transportation. Subdivision 1 of section 184 of the New York State Tax Law taxes every corporation engaged in aviation three quarters of

one percent of its gross earnings from all sources within the State. Said subdivision calls the tax a "franchise tax".

The defendants contend that the tax challenged herein is a franchise tax and as such it is allowed by section 1113(b) of the Federal Aviation Act. The defendants also contend that since the tax in question covers all earnings from every source that it does not constitute a gross receipts tax barred by the Federal Aviation Act.

That the tax challenged herein is based upon gross receipts is made clear by the affidavit of Paul B. Coburn submitted in opposition to the plaintiff's motion for summary judgment. Such affidavit demonstrates the operation of the tax in question with a hypothetical example of an aviation corporation. Such corporation is taxed on interest income, the sale of a plane, rental income, income from refueling services and ticket sales for passenger transportation. Gross earnings pursuant to subdivision 1 of section 184 of the Tax Law include all of the interest income, only the capital gains income from the sale of the plane, and all rental income. The amount received for refueling operations is reduced by the cost of the fuel. Income from ticket sales is taxed in full without reduction for the cost of providing the air transportation service. Thus section 184 of the Tax Law includes a tax on air carriers on the gross receipts from ticket sales for air transportation.

However, to apply section 1113 of the Federal Aviation Act to bar the tax in question would lead to inconsistent results and would make the statute irrational, or at least ambiguous. Subdivision b of section 1113 allows franchise taxes and sales taxes. This court cannot conceive of a sales tax which is not directly or indirectly a tax on the gross earnings from sales. Furthermore, such sales taxes can amount to substantial sums of money, for example, 7% at the Albany County Airport. This exceeds many of the taxes barred by section 1113.

Since the statutory language is inconsistent and ambiguous, the court must look to its legislative history to determine the legislative intent. Such history shows that the statute was

enacted to bar discriminatory taxes levied solely against airlines in addition to normal franchise taxes and other taxes. Section 184 of the Tax Law levies a franchise tax on all transportation carriers based upon gross earnings. The plaintiff has failed to show that this tax, in effect since 1880, is in any way discriminatory. As such it is not barred by section 1113 of the Federal Aviation Act.

The motion for summary judgment in favor of the plaintiff is denied in all respects. Since it appears that section 184 of the Tax Law is constitutional, the defendants are granted summary judgment pursuant to rule 3212(b) of the CPLR.

Submit judgment.

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CLERK

No. 82-585
No. 82-586

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

ALOHA AIRLINES, INC.,

Appellant,

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

Appellee.

HAWAIIAN AIRLINES, INC.,

Appellant,

v.

DIRECTOR OF TAXATION OF THE STATE OF HAWAII,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF OF STATES OF ALASKA, ARIZONA, OKLAHOMA, WASHINGTON, AND WEST VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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BRIEF OF STATES OF ALASKA, ARIZONA, OKLAHOMA, WASHINGTON, AND WEST VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

QUESTION PRESENTED

Whether in the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, Congress intended to preempt longstanding state business taxes applicable to a wide range of businesses, including airlines, merely because they were measured by gross receipts.

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STATEMENT OF INTEREST OF *AMICI*

The States of Alaska, Arizona, Oklahoma, Washington, and West Virginia have longstanding general business taxes measured by gross receipts applicable to a wide range of businesses, including airlines, which do business within the respective states.[1] In their briefs, the appellant airlines and the United States as *amicus curiae* have designated these and other generally applicable business taxes in a number of states including the *amici* states (hereinafter referred to as the "designated states") as the type of taxes on gross receipts which Congress intended to preempt under the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513 (hereinafter referred to as "§ 1513").[2] The *amici* states contest this position.[3]

The *amici* states have an interest which goes beyond a financial one. In the Brief for the United States as amicus curiae in Support of Appellants (U.S. Br.) the United States urges a standard for preemption of generally applicable state laws based on an imprecise articulation of federal policy in statutes dealing with aviation generally

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[1]These taxes are described in some detail in Section II of the Argument.

[2]See Brief Amicus Curiae of United States (in Support of Jurisdictional Statement) (U.S. Br.) at 11, nn. 15-16; Brief of Appellant Hawaii Airlines, Inc. (Hawaiian Br.) at 26, nn. 29-30; Brief for Appellant Aloha Airlines, Inc. (Aloha Br.) at 13-14. Jurs. St. of Aloha Airlines at 16. The appellants and United States have designated eleven states as having now or in the recent past taxes preempted under § 1513(a): Alaska, Arizona, Delaware, Hawaii, Indiana, Maryland, Mississippi, New York, Oklahoma, Washington, and West Virginia. These states will be referred to in this brief as the "designated states."

[3]This also is the position of the Air Transport Association and various airlines in other related litigation in state courts and administrative tribunals. *See State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1981); *Air Transport Assoc. of America v. New York Dept. of Taxation and Finance*, 458 N.Y.S.2d 709 (App. Div. 3d 1983); *Wien Air Alaska v. Alaska Dept. of Revenue*, No. 3AN 81-8382 (Alaska Sup. Ct., 3d Jud. Dist., filed Dec. 10, 1981); *Alaska Aeronautical Industries, Inc. v. Alaska Dept. of Revenue*, No. 3AN 81-4286 (Alaska Sup. Ct., 3d Jud. Dist., filed June 22, 1981); *Republic Airlines v. Washington Dept. of Revenue*, No. 82-2-01723-7 (Thurston Co., Wash. Sup. Ct., filed Dec. 30, 1982); *Northwest Airlines v. Washington Dept. of Revenue*, No. 82-24 (Wash. Bd. of Tax Appeals, filed May 28, 1982).

and by imprecise preemptive language in § 1513. We have concern that adoption of such a standard would not only contradict many of this Court's decisions on preemption, *e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 51 U.S.L.W. 4449 (April 20, 1983), but relegate to federal courts the primary role of determining which state laws are superseded by federal law, a function which more properly lies with Congress.

SUMMARY OF ARGUMENT

1. The taxes of the *amici* states, the other designated states, and Hawaii, which have been at issue in this and related litigation, are non-discriminatory business taxes *measured by* gross receipts and applicable to a wide range of taxpayers, not just airlines. The incidence of such taxes is not "gross receipts" but some aspect of doing business.[4]

2. In enacting § 1513, Congress did not intend to preempt generally applicable, non-discriminatory business taxes measured by gross receipts. This is because:

a. The general business taxes of the *amici*, the other designated states and Hawaii run counter to no federal policies. They are consistent with longstanding congressional policy not to interfere with the general business taxes of the states except in narrow, specifically articulated situations and only after careful study of the impacts of federal preemption.

b. Though the "plain language" of § 1513 actually is ambiguous, it nevertheless indicates that its preemptive effect is limited in scope.

c. the legislative history of § 1513 indicates that:

i. Its preemptive impact was limited in principal part to user taxes, including head taxes, similar in incidence or effect to the user taxes imposed by the Airport and Airway Revenue Act of 1970, 84 Stat. 236.

ii. To the extent that any preemptive effect of § 1513 extends beyond state user taxes,

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[4]*But see* Ind. Code Ann. §§ 6-2.1-2-1 to 6-2.1-2-4 (Burns 1982 Supp.) (tax on receipt of gross income).

including "head taxes," it extends only to discriminatory taxes which are in effect substitutes for such user taxes and which are imposed discriminatorily against airlines and not against a wide range of other businesses.

ARGUMENT

I. Introduction.

In its brief the United States argues that the challenged Hawaii tax and other state taxes based "on annual airline gross receipts" unless overturned "will progressively undermine the federal fiscal structure for the funding of civil aviation facilities." U.S. Br. at 10. The United States cites the current statutory compilations of the statutes of the *amici* and other designated states, eleven in total including Hawaii, implying that these taxes are "progressively" being enacted to circumvent the Congressional purpose to prohibit taxes on gross receipts. Further, Hawaiian Airlines implies that the *amici* and other states are examples of states "wishing to evade the prohibition contained in 49 U.S.C. § 1513." Brief for Appellant Hawaiian Airlines, Inc. (Hawaii Br.) at 26.

Despite the implications to the contrary, the taxes of the *amici* states are not examples of states wishing to evade a Congressional preemption. They are generally applicable business taxes measured by gross receipts, as the next section shows. All the taxes, except one, were in existence in 1970, and there is no Congressional intent to preempt any of them.

II. The Taxes of the Amici and Other States Are Longstanding, Business Taxes Applicable to a Wide Range of Taxpayers, Not Just Airlines.

A. Alaska.

Alaska imposes its business license "fee", the incidence of which is on "the privilege of engaging in a business in the state." Alaska Stat. § 43.70.020(a) (1982 Supp.). Between 1949 and 1979 it was applicable to all

businesses doing business in Alaska and was measured by a formula which included a percentage of the gross receipts of the business.[5] Though in 1978, the law was amended to remove that part of the "fee" calculated by use of gross receipts, there is ongoing litigation between Alaska and some airlines for pre-1979 tax liability.[6] For tax years prior to 1977, no major airline contended this tax was preempted under § 1513.

B. Arizona.

Arizona imposes its "transaction privilege tax" measured by gross receipts upon a wide range of businesses in the state. Ariz. Rev. Stat. Ann. §§42-1309, *et seq.* The incidence of this tax is "upon the privilege or right to engage in business in the State, although measured by the gross income of business activity conducted within the State." *Tower Plaza Investments, Ltd. v. DeWitt*, 109 Ariz. 248, 508 P.2d 324 (1973), *appeal dismissed*, 414 U.S. 1118 (1974).

The tax was first enacted in 1935, though airlines transportation was not formally listed in the classification with other carriers, utilities, contractors, mining and timber companies, and others until 1954.[7] Though the application of this tax to intrastate operations of airlines has been declared unconstitutional,[8] prior to that litigation, Arizona collected from the airlines taxes imposed by this chapter until 1975.

C. Delaware.

Delaware's tax is the only one of the eleven not in

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[5]See Chapter 43, 1949 Alaska Sess. Laws 132. Prior to 1978, the "fee" generally included a fixed sum plus .5% of the gross receipts of the business in excess of $20,000. However for "gross volume" in excess of $10,000, the rate was .25%. See Alaska Stat. § 43.70.030 (1977).

[6]See note 3, *supra*. In Alaska five other appeals by air carriers have been stayed at the administrative hearing level pending the outcome of current litigation.

[7]Chapter 77, 1935 Ariz. Sess. Laws 310; chapter 136, 1954 Ariz. Sess. Laws 252.

[8]*State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1981).

existence prior to 1973. Imposed in 1975,[9] it resembles the Alaska tax described above in that it is license tax upon persons engaging in business measured in part by a flat fee and in part by a percentage of the gross receipts of the business. Del. Code Ann. Tit. 30 §2301. To date, there has been no challenge to this tax by any airline.

D. **Hawaii.**

Hawaii's tax, challenged in this action is described in the brief of the appellee. Like other taxes designated by the United States, it is a longstanding tax of general applicability, though one on property rather than on the act or privilege of engaging in business as are the taxes of the other designated states.

E. **Indiana.**

Indiana imposes its "gross income tax" on all businesses in Indiana, including airlines. Ind. Code Ann. §§ 6-2.1-2-1 to 6-2.1-2-4 (Burns 1982). This tax was first imposed in 1933 as a tax on gross income, chapter 50, 1933 Ind. Acts 388, and was amended in 1937 to become a tax "upon the receipt of gross income." Chapter 117, 1937 Ind. Act. 611. To date no airline operating within Indiana has challenged its imposition.

F. **Maryland.**

Since 1920 Maryland has imposed a "franchise tax" measured by gross receipts on all utilities and transportation companies. Md. Ann. Code Art. 81, § 130; chapter 226, 1929 Md. Laws 621; *see Cumberland & P.R. Co. v. State*, 92 Md. 668, 48 A.2d 503, 507 (1901) (tax is franchise tax). No airline has challenged the imposition of this tax in Maryland.

G. **Mississippi.**

Mississippi imposes its general business privilege tax "for the privilege of engaging or continuing in business or doing business within [the] state." Miss. Code Ann. § 27-65-13 (1972). *See generally Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). This tax has been in effect since 1932, chapters 90, 91, 1932 Miss. Laws 176, 196, and

[9]Chapter 24, 60 Del. Laws (Pt. 1) 45 (1975).

airlines were specifically included in the utilities section in 1955. Chapter 109, § 10, 1955 Miss. Laws (ex. sess.) 229. Though the statute was amended in 1978 changing its effects on airlines, chapter 490, 1978 Miss. Laws 933, there still could be pre-1978 tax liability.

H. **New York.**

Like Maryland, New York imposes a franchise tax measured by gross income on transportation companies and utilities. N.Y. Tax Law § 184 (McKinney Supp. 1982). It has been in effect since 1896. Chapter 908, 1896 N.Y. Laws. The ATA has challenged this tax relying on § 1513.[10]

I. **Oklahoma.**

Though the United States did not designate Oklahoma's tax as suspect, Hawaiian Airlines did. Hawaiian Br. at 26, n. 30. Oklahoma has since 1935 imposed its general sales tax on all sales, including sales of transportation services. Okla. Stat. Ann., tit. 68, § 1354(c) (West 1982 Supp.); Chapter 66, 1935 Okla. Sess. Laws 308. Transportation by airlines has been included within the scope of the tax at least since 1963. Chapter 367, 1963 Okla. Sess. Laws 680. No airline has contested the application of this tax under § 1513.

J. **Washington.**

Washington imposes a tax "for the act or privilege of engaging within this state" in various businesses, including railroad, telephone, telegraph, gas distribution, urban transportation, sea transportation, motor transportation, and "all public service businesses." RCW 82.16.020. The term "public service business" includes " airplane transportation." RCW 82.16.010(11). Though termed a "public utility tax," it taxes many businesses which are not subject to regulation by the state utilities and transportation commission. Nevertheless, it has been characterized by the Washington Supreme Court as a "franchise tax." *Public Utility Dist. No. 3 v. State*, 71 Wn.2d 211, 212, 427 P.2d 713, 714 (1962).

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[10]See note 3, *supra*. The State of New York is filing a brief amicus curiae in this case, focusing on the nature of its tax as a franchise tax and the expressed intent in § 1513 not to preempt such taxes.

The incidence of this tax is on the privilege of engaging in business in Washington. It is a tax measured by, though not imposed on, gross receipts. RCW 82.16.020. Though the statute imposes varying rates on the various types of businesses, the rate applicable to airline companies is among the lowest.

Currently, two airlines, Republic and Northwest, are litigating the preemptive effect of § 1513 on this tax. On May 10, 1983, the Washington State Board of Tax Appeals upheld the state's tax against a claim by Northwest that the tax was preempted. See note 3, *supra*. Northwest has foregone its right to a refund of taxes paid prior to 1977; Republic has foregone its rights for years prior to 1978.

K. **West Virgina.**

West Virginia imposes a tax on all carriers measured by net income, for those conducting interstate business, and by gross income, for those conducting intrastate business. W. Va. Code § 11-12A-2 to -3 (1982 Supp.). It has been imposed since 1933, chapter 33, 1933 W. Va. Acts. 219, and was specifically made applicable to airlines in 1959. Chapter 165, 1959 W. Va. Acts 534. To date, no airline has challenged the imposition of this tax.

L. **Summary.**

The taxes described above are not "progressively" being enacted to "undermine" the federal airport program as suggested by the United States. U.S. Br. at 10. Airlines are not singled out for special or discriminatory treatment. These are not the types of taxes Congress intended to preempt in § 1513.

III. In Enacting § 1513, Congress Did Not Intend to Preempt Generally Applicable, Non-Discriminatory Business Taxes Measured by Gross Receipts.

The history of § 1513 spans a number of Congresses. Each house of Congress passed S. 3755, 92d Cong., 2d sess. in 1972, which for all relevant purposes was identical to § 1513.[11] However, for fiscal reasons, S. 3755 was pocket

[11]The only difference is that S. 3755 grandfathered in any existing

vetoed by the President.[12]

Versions of the vetoed bill were introduced in early 1973[13] and legislation was enacted promptly thereafter.[14] The relevant legislative history includes hearings,[15] committee reports,[16] and floor debates[17] from two sessions of Congress as well as prior versions of the bills and the general history and purpose of the federal airway

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tax "on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts therefrom" in effect prior to May 21, 1970, until July 1, 1973. The final § 1513 extended the life of such preempted taxes to December 31, 1973.

[12]*See* 118 Cong. Rec. 37203.

[13]Bills introduced included: S. 38, H.R. 6388, H.R. 4082, H.R. 4214, H.R. 4265, H.R. 4182, H.R. 627, H.R. 1784, 93d Cong., 1st sess.; *see also* H.R. 4213, 93d Cong., 1st sess. (providing for moratorium on imposition of various state taxes).

[14]119 Cong. Rec. 18047 (June 5, 1973) (Senate); *id.* 17344 (May 3, 1973) (House).

[15]In the 92d Congress, both the Senate and the House held hearings specifically on the issue of state taxation. *Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and identical bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. (1972) (*1972 House Hearings*); *Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S. 2397, S. 3302, S. 3611, S. 3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. (1972) (*1972 Senate Hearings*).

In the 93d Congress, only the House held hearings. *Airport Acceleration Development Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 (and all similar bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st sess. (1973) (*1973 House Hearings*). The Senate Commerce Committee stated that additional hearings were unnecessary. S. Rep. No. 12, 93d Cong., 1st sess. 6 (1973).

[16]H.R. Rep. No. 1543, 92d Cong., 2d sess. (1972) (1972 Conference Report); S. Rep. No. 1005, 92d Cong., 2d sess. (1972) (1972 Senate Report); H.R. Rep. No. 1279, 92d Cong., 2d sess. (1972) (1972 House Report); H.R. Rep. No. 225, 93d Cong., 1st sess. (1973) (1973 Conference Report); S. Rep. No. 12, 93d Cong., 1st sess. (1973) (1973 Senate Report); H.R. Rep. No. 157, 93d Cong., 1st sess. (1973) (1973 House Report).

[17]118 Cong. Rec. 27812-29 (Aug. 10, 1972) (1972 Senate debate on S. 3755); *id.* 29152-56 (Aug. 18, 1972) (1972 House debate on H.R. 14847); *id.* 30116-17 (Sept. 11, 1972) (Senate disagreement to House amendments); *id.* 35116 (Oct. 11, 1972) (House agreement to 1972

program.[18] Appellants have painted an incomplete picture of the Congressional process in enacting § 1513. Congress did not intend to preempt generally applicable business taxes of the type described in section I above. Congress may have the power to so preempt these taxes under appropriate conditions.[19] It has not demonstrated the requisite intent here.

Before turning to the language of the statute and its legislative history, we examine the federal policies which the United States, the ATA, and the airlines claim are violated by allowing the generally applicable business taxes of Hawaii and the designated states to stand. Not only are the policy arguments made by the United States and others unfounded, but the continued vitality of the taxes described above is completely consistent with applicable federal policy.

A. The Continued Vitality of the Generally Applicable Business Taxes of Hawaii and of the Designated States Is Consistent With Federal Policies.

The United States argues that the Hawaii tax and the taxes of the designated states will "frustrate" federal interests that are expressed through various federal statutes which promote the development of civil aeronautics. U.S. Br. at 11-12. See also Brief of Appellant Aloha Airlines, Inc. on the Merits (Aloha Br.) at 23, which adopts the United States' discussion of that policy.

Conference Report); *id.* 35860-62 (Senate agreement to 1972 Conference Report); 119 Cong. Rec. 3196-97 (Feb. 2, 1973), 3348-61 (Feb. 5, 1973) (Senate debate on S. 38); *id.* 13896-911 (May 2, 1973) (House debate on H.R. 6388); *id.* 14662-63 (May 8, 1973) (Senate disagreement to House amendments); *id.* 17344-45 (May 30, 1973) (House agreement to 1973 Conference Report); *id.* 18045-47 (June 5, 1973) (Senate agreement to 1973 Conference Report).

[18] *See generally Massachusetts v. United States*, 435 U.S. 444 (1978).

[19] We do not here address the argument made by the appellee that any attempted preemption would exceed the power of Congress under the commerce power, as limited by the Tenth Amendment of the Constitution. *See Hodel v. Indiana*, 452 U.S. 314 (1981); *National League of Cities v. Usery*, 426 U.S. 833 (1976). We incorporate the arguments made by appellee on this issue.

This federal policy argument of the United States is not sound for three reasons. First, a federal policy to "promote" an enterprise such as aviation does not result in a preemption of any generally applicable burdens including tax burdens placed on that enterprise by the states. Second, there are conflicting and controlling policies of federalism which require Congress to state clearly its intent before a preemption of state tax laws will be found. Third, Congress historically has proceeded with extreme caution before acting to preempt state tax laws.

1. Federal Policy to Promote Aeronautics Does Not Result in Preemption of Generally Applicable Tax Laws.

The United States cites simply to federal policies to encourage, promote, and foster civil aeronautics and air commerce. Even assuming that such a policy is a strong one, its existence is not determinative of preemption. Such policies are not indicative of an intent to preempt state laws unless Congress "has unmistakenly so ordained." *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981), *quoting Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

The principle is also illustrated in this Court's opinion in *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 51 U.S.L.W. 4449, 4457 (April 20, 1983), where the United States argued that the federal policy to promote the development of nuclear energy preempted a California statute requiring a moratorium on new nuclear power plants until a solution to the waste disposal problem had been found. Clearly, the California moratorium limited the growth of nuclear power or nuclear energy in California. However, the Court examined the specific intent of Congress as expressed in statutes and their legislative history to determine if there existed the requisite Congressional intent to preempt state laws. There, like here, Congress had not "unmistakenly so ordained" preemption.

2. Considerations of Federalism Require Congress to State Its Intent to Preempt State Tax Laws Clearly and Expressly.

Because the power to levy generally applicable business taxes is within "the historic police powers of the state," any preemption must be "a clear and manifest purpose of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This is particularly true in matters, such as this, where federal preemption would upset historic federal-state relationships. As stated in *United States v. Bass*, 404 U.S. 336, 349 (1971):

> In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

This Court has found preemption of state tax laws only where Congress has spoken specifically regarding its intent to so preempt. For example in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), this Court invalidated a New Mexico tax only after finding that Congress expressly had singled out that tax as the type of tax sought to be preempted. *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Sullivan v. United States*, 395 U.S. 169, 178 (1969) (state sales and use taxes not preempted where Congress did not specifically so intend).

3. Historically, Congress Has Proceeded With Extreme Caution in Preempting State Tax Laws.

Congress historically has recognized the high degree of specificity it must employ in preempting state tax laws, conforming the scope of preemption with the specific problem which gave rise to its need.

In Public Law 86-272, 73 Stat. 555, 15 U.S.C. §§ 381-84, Congress limited the authority of states to impose a net income tax on income derived from interstate commerce. This law was deemed necessary in response to a particular

Supreme Court decision, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and was enacted only after Congress understood the effects it would have on the states and the number of states affected.[20]

In the Securities Acts Amendments of 1975, § 21, 89 Stat. 95, 15 U.S.C. § 78bb(d), Congress restricted state taxation of the change in beneficial or record ownership of securities under certain instances. Again, the language of the preemption is very specific and enacted with a view to preserve traditional state taxing jurisdiction.[21]

In several recent statutes, Congress has preempted "discriminatory taxes" levied against particular industries operating in interstate commerce. Congress has acted to preempt such taxes against railroads,[22] motor carriers,[23] and certain electric utilities.[24] In each case, the preemptive language is very specific. Again, Congress refrained from treading upon areas of historical state authority. Indeed, regarding the preemption of state taxes on generation or transmission of electricity which discriminate against out-of-state producers or consumers, the Senate Committee stated:

> The committee believes that this is an example of discriminatory taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce.

S. Rep. No. 938, pt. I, 94th Cong., 2d sess. 437 (1976).

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[20]*See* S. Rep. No. 658, 86th Cong., 1st sess. pp. 3, 6-9 (1959) (reference to 35 states, the District of Columbia, and 8 cities).

[21]The Senate Report states: "This provision is designed to facilitate the development of a national system for handling securities transactions while at the same time preserving the state taxing powers over transactions with which the taxing state has a traditional jurisdictional basis for taxation. S. Rep. No. 75, 94th Cong., 1st sess. 60 (1975).

[22]Railroad Revitalization and Regulatory Reform Act of 1975, 90 Stat. 531, *now codified as* 49 U.S.C. § 11503 (prohibiting states from taxing railroad property more heavily than other industrial or commercial property).

[23]Motor Carrier Act of 1980, 94 Stat. 823, 49 U.S.C. §11503a.

[24]Tax Reform Act of 1976, §2121(a), 90 Stat. 521, 15 U.S.C. §391. *See Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

In sum, Congress has acted in selected cases in the past to preempt a state's power of taxation. But in each such case Congress acted carefully and with an understanding of the historic and appropriate role of states in levying general business taxes on industries operating in interstate commerce. When compared to these other examples of Congressional preemption, the interpretation given to § 1513 by the United States, the ATA, and the airlines is strained. They seek to have this Court attribute to Congress an intent to accomplish broadly what it historically has done narrowly and accomplish by inference what it has historically only done by express statement of intent.

We turn now to the language of the statute and its legislative history to show why appellants' position does not fit with what this Court has done in the past.

B. Section 1513 Indicates That Congress Did Not Intend a Broad Preemption of State Tax Laws.

1. The "Plain Meaning" of Section 1513 Indicates No Intent to Preempt Generally Applicable Business Taxes.

The United States finds no "contradiction, ambiguity, or 'paradox' in the statutory scheme," U.S. Br. at 13, and by its listing of designated states argues that the statutory language inevitably leads to the conclusion that any and all taxes measured by gross receipts applied to airlines are preempted by that language.[25]

Section 1513(a) prohibits state taxes "on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts therefrom * * * *" This language indicates a much narrower scope of preemption for at least three reasons: First, subsection (a) itself indicates that only airline specific taxes were to be preempted; second, there exist inherent

[25]The United States ignores the distinction between taxes *on* gross receipts and taxes *measured by* gross receipts. U.S. Br. at 11.

conflicts between subsection (a) on the one hand and subsections (b) and (c) on the other which indicate a limited scope of subsection (a); and third, there is an unwarranted assumption on the part of the United States, the ATA, and the airlines that the term "on the gross receipts therefrom" in subsection (a) indicates an intent to preempt taxes *measured by* gross receipts.

(a) Subsection (a) Indicates That Only Airline User Taxes Were Preempted.

The United States, the ATA, and the airlines read subsection (a) as preempting any state tax on *or measured by* gross receipts which includes in its universe of subjects airlines or users of airlines. The plain language indicates otherwise. The language is directed at taxes specifically on airline users: persons, the carriage of persons, and air transportation. Taxes of general applicability on businesses, including airlines, are not addressed. At the very least the language is ambiguous.

(b) Subsection (a) Conflicts with the Other Subsections of § 1513.

Subsection (a), *supra*, must be read with subsection (b), which states in relevant part:

> Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those enumerated in subsection (a) * * * including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * * *

The United States, the ATA, and the airlines contend that this subsection does not limit the scope of subsection (a) because of the "other than those enumerated" language. Therefore, they argue, if a tax is enumerated in subsection (a), it is preempted despite any language in subsection (b) to the contrary.[26] This argument flies in the face of commonly accepted canons of statutory construction[27] and defies common sense.

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[26] U.S. Br. at 13, 15; ATA Br. at 5; Hawaiian Br. at 12-13; Aloha Br. at 12.

[27] *See, e.g., Pennhurst State School and Hospital v. Halderman,*

Subsection (b) states that included in the taxes "other than those enumerated in subsection (a)" are a number of types of generally applicable state business taxes: property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. The subsection (b) enumeration is illustrative of types of taxes not included in the subsection (a) enumeration, which itself is inclusive of the kind of taxes for which coverage was intended. In other words, for example, a franchise tax is "included" in the types of taxes not enumerated in subsection (a). Therefore, such a tax, no matter how measured, is permitted under the plain language of § 1513.

Two comparisons of subsections (a) and (b) indicate that the meaning of § 1513 at least is ambiguous.

First, subsection (b) permits sales tax on the sale of goods or services. Subsection (a) purports to prohibit a tax on the sale of air transportation. This is inherently contradictory in that a sales tax on air transportation is a sales tax on a service. Perhaps one can create a distinction which arguably could have been contemplated by Congress, but we can find none in the legislative history.[28]

Second, subsection (b) allows franchise taxes or property taxes. As pointed out by the Hawaii Supreme Court and by this Court on numerous occasions, a tax may be a franchise tax or a property tax even if measured by gross receipts.[29] Thus, the response by the airlines that subsection (a) controls over subsection (b) in all respects flies in the face of another comparison and its history.

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451 U.S. 1, 18 (1981) (Court must not be guided by single sentence but to "the provisions of the whole law, and to its object and policy").

[28]This contradiction is made even more glaring considering the source of the language in subsection (b) purporting to prohibit taxes on the sale of air transportation. As introduced S. 3755 contained no such prohibition. Instead, to the language later incorporated in subsection (b) preserving "sales or use taxes on the sales of goods or services" there was added: "(other than on the sale of interstate air transportation or any portion thereof)." The shift of this language from the savings provision to subsection (a) points out not only the necessity to read the two subsections together, in that they cover some of the same taxes, but S. 3755, as reported, preempted less than S. 3755 as introduced. For example, the "any portion thereof" language was deleted, indicating that sales of intrastate transportation were not affected.

[29]See note 32, *infra*.

Subsection (b) exempts from the subsection (a) preemption "rental charges, landing fees, and other service charges * * * *" This language was added in (b) because industry representatives, including the ATA, recognized that such charges would fall within the prohibition of subsection (a).[30]

Accordingly, subsection (a) does not control over subsection (b); they must be read together to resolve any ambiguities inherent in them.[31]

(c) A Preemption of a Tax "on Gross Receipts" Does Not Preempt a Tax Measured by Gross Receipts.

The plain language of subsection (a) indicates that, at most, taxes *on* gross receipts are preempted.

The United States, the ATA, and the airlines argue that subsection (a) preempts four *types* of taxes: taxes (1) on persons, (2) on the carriage of persons, (3) on the sale of air transportation, or (4) on gross receipts derived therefrom. This argument is flawed. The first three types

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[30] *See, e.g., 1972 House Hearings* at 100.

[31] A comparison of subsection (a) and (c) also is useful. Subsection (a) allows an exemption from its preemptive sweep for an airport operating authority which is collecting a head tax on passengers and is engaged in paying off loans for airport improvements through the proceeds of that tax. The exemption is not just for head taxes, which may be levied by such authority, but for the entire subsection (a). If, as the United States, the ATA, and the airlines suggest, subsection (a) was intended to preempt all kinds of generally applicable business taxes, subsection (c) is quite confusing. Consider the following example.

A municipality levies a head tax in 1971 to pay off some debts for airport improvements. The state imposes a general business tax measured by gross receipts in 1971 also. Accordingly, under subsection (c), subsection (a) is not effective until December 31, 1973. Does that mean that state's tax, designated for preemption by the United States is applicable prior to December 31, 1973? Does it mean that such general business tax, measured by gross receipts, is inapplicable only for those receipts involved in transportation to or from the municipality with the grandfathered head tax, but not those receipts involved in transportation between other cities?

Subsection (c) can be read consistently with subsection (a) only if subsection (a) has a limited effect, i.e., it applies only to head taxes and other user taxes. A broader reading of subsection (a) renders subsection (c) confusing. Because the Court must give effect to all parts of the statute, the plain meaning of subsection (a) must be limited, and the contention of the United States, the ATA, and the airlines rejected.

of taxes define the incidence of the tax: *on* persons, *on* the carriage of persons, or *on* the sale of air transportation. The fourth type of tax does not define an incidence, but a measure: gross receipts. This is inconsistent with the longstanding distinction of this Court, known to Congress, between a tax the incidence of which is *on* gross receipts and a tax *measured by* gross receipts.[32] It also is inconsistent with the common canon of statutory construction *noscitur a sociis*: the meaning of one term must be defined in accordance with the terms around it.[33] Accordingly, because the first three types of taxes are defined by their incidence, the fourth type must also define an incidence, unless the language specifically indicates otherwise. Rather than prohibit taxes measured by gross receipts, subsection (a), at most, preempts taxes levied directly *on* gross receipts from the various business activities described.[34]

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[32]*See, e.g., Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434, 441 (1959); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256-57 (1938); *Pullman Co. v. Richardson*, 261 U.S. 330, 338-39 (1923).

[33]In *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961), this court stated: "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."

[34]"There is another plain language argument indicating a limited scope of preemptive intent. This was made to the Arizona Court of Appeals and accepted there by the dissent. *State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596, 602 (Ariz. App. 1980).

The term "or on the gross receipts derived therefrom" relates only to the last antecedent: the sale of "air transportation." *See United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972). Accordingly a tax on gross receipts (or even measured by gross receipts) would be preempted only if it is on the sale of "air transportation." "Air transportation" is defined to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." 49 U.S.C. §1301(10). Those terms in relevant part mean carriage of persons or property between

> a place in any State * * * and a place in any other State * * *; or between places in the same State of United States through the air space over any place outside thereof; * * * *

Though in the instant case before the Court, this definitional test may be met, in many of the *amicus* and other designated states, such as Arizona and Washington, it is not. That is because those states impose their taxes only on intrastate business. Interstate business is exempted by state law or administrative practice.

2. Even If There Is No Ambiguity on the Face of § 1513, This Court Should Examine its Legislative History.

The United States, the ATA, and the airlines seek to have this Court ignore the legislative history of § 1513 under a "plain meaning" argument. The time is long past when hundreds of pages of legislative history can be ignored in determining even the plain meaning of a few words of a statute, particularly when the result would be a substantial change in existing law. *See, e.g., Muniz v. Hoffman*, 422 U.S. 454, 469-70 (1975).[35]

Indeed, if this statute is so "plain" in its meaning, why did it take the airlines so long to raise the contentions they now make in a number of states? In many of the states with taxes measured by gross receipts, the airlines continued to pay its taxes long after the 1973 Act.

We turn now to legislative history of § 1513.

C. The Legislative History of § 1513 Indicates That Congress Did Not Intend to Preempt Non-Discriminatory, Generally Applicable Business Taxes.

1. The Legislative History Indicates That Congress Intended to Preempt User Taxes.

The Airport and Airway Development Act of 1970, 84

Accordingly, the preemptive language does not apply. So, even if subsection (a) attempts to prohibit a tax measured by gross receipts, it does not prohibit some states' taxes in that they are imposed only on airlines in intrastate commerce. See also note 28 for evidence that preemption of state taxes on intrastate transportation was not intended.

We raise this issue not so much to find an easy escape for some of the states, but because it indicates the limited nature of the Congressional intent to preempt state laws.

[35]Indeed, to state that §1513(a) has a plain meaning "ignores reality." *See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L.Rev. 195, 199 (1983). *See also Federal Bureau of Investigation v. Abramson*, 102 S.Ct. 2054, 2061 n. 7 (1982), which states: " 'The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification,' " *quoting United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

Stat. 219, and the companion Airport and Airway Revenue Act of 1970, 84 Stat. 236, were enacted to increase funding for the nation's airports and airways. These two statutes represent culmination of many years of Congressional and executive branch studies and proposals for user taxes to improve the airports and airways.[36]

The 1970 Act imposed several types of user taxes to finance an Airport and Airway Development Trust Fund to finance the federal share of such development. These taxes included a passenger ticket tax, a tax on the transportation of property, a fuel tax and a "head tax" on international departures. *See generally Massachusetts v. United States*, 435 U.S. 444 (1978). Though possible adverse impacts of head taxes were presented to Congress,[37] Congress took no action in 1970 to preempt them. Indeed, under one proposal before the Congress such local "user charges" were to be encouraged as a matter of federal policy.[38]

In 1972, one particular form of user tax—the "head tax"—became particularly controversial. This Court in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972), upheld the constitutionality of head taxes levied by the Evansville-Vanderburgh Airport Authority in Indiana and by the State of New Hampshire. With that decision such taxes proliferated causing some member of Congress and airlines officials to fear disruption of the airline system.[39]

In 1972, federal legislation was introduced to prohibit

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[36] *See, e.g., Hearings on Administration's Proposals on Airway User Charges, Before the House Comm. on Ways and Means*, 89th Cong., 2d sess. (1966); *Hearings on Administration's Proposal on Aviation User Charges Before the House Comm. on Ways and Means*, 91st Cong., 1st sess. (1969), *Hearings on the Airport & Airway Development Act of 1968 Before the Aviation Subcomm. of the Senate Commerce Committee*, 90th Cong., 2d sess. (1968).

[37] *See Hearings on Administration's Proposal on Aviation User Charges before the House Comm. on Ways and Means*, 214, 91st Cong., 1st sess. (1969) (testimony of representative of the ATA).

[38] *See Hearings on Aviation Facilities Maintenance and Development, Pt. 1, before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st sess. 138-39 (1969).

[39] *See, e.g., 1973 House Hearings* at 64-65, 67, 97-99, 101-02.

user taxes, such as the head tax, which had been imposed by the United States in the 1970 Act.[40]

The legislative history indicates clearly the relationship between the state taxes intended to be prohibited and the federal taxes which were imposed on various users of airways and airports in the 1970 Act. Perhaps the most succinct statement of purpose in the 1973 House Report, at 3:

> H.R. 6388 prohibits the so-called "head tax" by any government agency other than the United States, on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate by the Federal Government, and *will not be subject to the various user taxes* being levied in a number of jurisdictions across the country. (Emphasis added.)[41]

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[40] *E.g.*, S. 3611, 92d Cong., 2d sess., H.R. 14897, H.R. 14991, 92d Cong. 2d sess.

The airlines and the ATA cite a 1971 bill, H.R. 2337, 92d Cong., 1st sess. (1971), introduced by Representative Moss, which would have prohibited states from levying a tax "on the carriage of persons in air transportation." ATA Br. at 6-7; Hawaiian Br. at 18; Aloha Br. at 19. In litigation in other states, the Moss bill has been cited for the proposition that § 1513 was not intended to be limited to preempt head taxes. Despite the problems of imputing a 1973 intent of the entire Congress from a 1971 bill introduced by one Representative, we do not disagree with that conclusion. The Moss bill, like all the bills introduced prior to the 1972 Hearings indicated, by their plain language an intent to preempt state taxes on users of airlines. These go beyond head taxes, though head taxes were considered to be the most disruptive form of duplicative user taxes.

[41] The 1972 Senate Report at 5 states:

> [S. 3755] prohibits the levying, by State and local governments, of passenger "head" taxes or use taxes on the carriage of persons in air transportation. * * *
>
> * * * *
>
> The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

The Senate Committee continued, at page 20:

> The provision is in response to a situation which has been brought about by an April 19, 1972, Supreme Court decision in *Evansville-*

One of the prime sponsors in the Senate, Senator Cannon, repeated this relationship between the federal user taxes imposed and the state and local user taxes prohibited. Indeed, he viewed the enactment of § 1513 as accomplishing what the 1970 Act was intended to do: preempt state and local user taxes of the same sort as the federal taxes. In 1973, Senator Cannon stated:

> Finally, Mr. President, the committee bill prohibits State and local taxation of air fares. The Congress intended in 1970 to preempt the States and localities from levying such taxes, as taxation on air fares is one of the predominant sources of revenue for the trust fund. Recent Supreme Court decisions necessitate the clarification of this congressional policy determination.

119 Cong. Rec. 3350 (Feb. 5, 1973).[42]

Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al., upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

This legislative intent is echoed in the 1973 Senate Report at 4, 6 (describing the issue as one of "state and local 'head' taxes or user fees on passengers in air transportation"), 12, 17 (response to *Evansville*), 25-26 (describing link between federal system of taxes and prohibition of state user taxes). *See also* 1973 House Report at 4-5 (response to head tax proliferation).

[42]Other floor debates in the Senate support this position. *E.g.*, 118 Cong. Rec. 17468 (May 16, 1972) (remarks of Sen. Cannon on introduction of S. 3611) ("the High Court has opened the door wide to multiple passenger taxation"); *id.* 22599 (June 27, 1972) (remarks of Sen. Cannon on introduction of S. 3755) ("it was our firm intent that the Federal excise tax be the only tax on passengers in air transportation"); *id.* 27814 (Aug. 10, 1972) (remarks of Sen. Cannon) ([head] taxes "inimical to the development of a national system funded in large part by uniform Federal taxes"); 119 Cong. Rec. 214-15 (Jan. 4, 1973) (remarks of Sen. Cannon on introduction of S. 38).

In the House, the debates were to the same effect. For example, Representative Bingham stated:

> [T]his legislation endorses and perpetuates user taxes in the aviation field by the Federal Government but prohibits them as a revenue device for State and local governments.

Id. 13903 (May 2, 1973). *See also id.* 13899 (remarks of Rep. Kuykendall).

Indeed, the ATA in its brief admits that § 1513 was enacted "in order to prohibit the States from imposing taxes on the same air carrier receipts on which the Federal taxes were based." ATA Br. at 4.[43]

2. To the Extent § 1513 Preempts State or Local Taxes Other Than User Taxes, It Preempts Only Discriminatory Taxes, Such as Ohio's, Not Business Taxes of General Applicability.

Although the legislative history indicates that the primary purpose of § 1513 was to preempt state and local head taxes or other user taxes of the type imposed by the federal government in 1970, there is some language in § 1513 which could be construed to expand beyond the scope of the 1970 federal user taxes.

In 1972, the Senate held hearings on S. 3611 which simply prohibited state taxes "on the carriage of persons in air transportation." After the hearings, Senators Cannon and Magnuson introduced S. 3755, with the following prohibitory language:

> No State * * * shall levy or collect a tax * * * on persons traveling in air transportation or on the carriage of persons in air transportation or on the gross receipts therefrom.

The source of this language, added to S. 3611, prohibiting state taxes "on the gross receipts derived therefrom" is not clear. The United States, the ATA, and the airlines speculate that it was added in response to a brief statement in the testimony of Whitney Gillilland, Vice-Chairman of the Civil Aeronautics Board in the 1972 Senate Hearings. In that testimony, he made passing reference to an Ohio excise tax imposed only on airlines,

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Statements by the prime sponsors in the committee hearings also support the proposition that the prohibition in §1513 was in response to *Evansville* and was designed to prohibit state and local user taxes. *See e.g., 1972 Senate Hearings at 129* (remarks of Sen. Cannon).

[43]This is consistent with testimony of the ATA before Congress. *See* 1972 Senate Hearings at 168-169, 172; *1972 House Hearings* at 76; *1973 House Hearings* at 96-98.

which is measured by gross receipts. The entirety of his testimony on the Ohio tax is as follows:

> In some cases, the increased taxes on airlines are not going to airport development at all. The Supreme Court is being asked to review an Ohio tax on the gross receipts of airline business done in Ohio. The revenue from this source is earmarked under Ohio law to pay the deficit in the policeman's and fireman's disability and pension fund.

1972 Senate Hearings, at 137.

Assuming that the gross receipts language was inserted as a result of this brief oral testimony to four Sentors,[44] it is a quantum leap to impute to the whole Senate, and the House,[45] an intent to preempt all generally applicable business taxes measured by gross receipts. That such a broad result was not intended by Congress is supported by legislative history much more specific than that short paragraph.

Perhaps the most revealing indication of this is Senator Cannon's response to a 1972 amendment proposed on the Senate floor by Senator Cotton of New Hampshire. Because New Hampshire was the only state with a head tax, Senator Cotton sought to have that tax "grandfathered" for a short period of time in order to give the State time to find an alternative source of revenue. Accordingly, he proposed the following amendment to S. 3755 after the prohibitory language in subsection (a):

> *Provided however*, That any State * * * which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

118 Cong. Rec. 27816 (Aug. 10, 1972).

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[44] *See 1972 Senate Hearings* at 129 (those present were Senators Cannon, Spong, Pearson and Stevens).

[45] Mr. Gillilland also mentioned briefly the Ohio tax in his testimony in the *1972 House Hearings* at 52. However, the House did not adopt any "gross receipts" language in 1972. The reported bill

This grandfather clause simply repeated the prohibitory language. Thus, whatever state taxes were preempted by subsection (a) were to be grandfathered by this amendment if such taxes were in effect prior to May 21, 1970. Under the position of the United States, the ATA, and the airlines, this would grandfather the taxes of Arizona, Alaska, Washington, West Virginia, New York, and all the other designated states, except Delaware, as well as Ohio's discriminatory excise tax. However, Senator Cannon did not so describe the amendment and, therefore, did not comprehend the scope of the preemptive language to include the taxes of those states. He supported the Cotton amendment, stating: "The amendment applies only to the State of New Hampshire; it is the only State that had a head tax being levied and collected at the time of the adoption of the Airport and Airway Development Act." *Id.* at 27817.[46]

Had the "gross receipts" language been intended to preempt the large number of state taxes of general applicability in effect in 1970, Senator Cannon likely would not have given such a narrow reading to the Cotton amendment. The narrow reading given it by the manager of the bill in the Senate indicates that the preemptive language (like the grandfather language) was not intended to have the broad preemptive effect argued by the United States, the ATA, and the airlines.

The other major amendment adopted by the Senate also supports the narrow reading of subsection (a). Senator Chiles of Florida sought an amendment which would allow a head tax preempted under subsection (a) to remain in effect if that tax was used to repay obligations for airport improvements.[47] A version of the amendment now is

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called for an 18 month moratorium on state and local taxes "on persons traveling in interstate, overseas, or foreign air transportation or on the carriage of persons in interstate, overseas, or foreign air transportation." 1972 House Report at 1.

[46]In the House, this amendment was referred to as "tailored to the specific situations * * * *" 119 Cong. Rec. 13899 (May 2, 1973) (remarks of Rep. Kuykendall). *See also id.* 13905 (remarks of Rep. Adams); *id.* 17344-45 (May 30, 1973) (remarks of Rep. Staggers).

[47]*See* 118 Cong. Rec. 27818-20 (Aug. 10, 1972).

codified as subsection (c) to § 1513. Under these conditions, the head tax would not just be saved, but the entire subsection (a) would be ineffective. If subsection (a) were to have a broad preemptive effect on taxes of general applicability, this amendment would lead to incongruous results. For example, if there was an airport in a state levying a head tax which met the Chiles amendment conditions, would the whole state taxing scheme otherwise preempted now be grandfathered?[48] Or, would just the head tax be saved? If the latter, why was the amendment not so drafted?

The reality is that the Senate and the House in 1972 did not give any broad effect to the gross receipts language which was added by the Senate Committee. In fact, in the 1972 debate, there was no mention of the gross receipts provision. Head taxes and "discriminatory" taxes were the concern of the members.[49] The scope of § 1513 must be construed according to the "evil which Congress sought to correct and prevent." *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951). As of 1972, this "evil" was the head tax and other user taxes.

Though in 1973 there were isolated remarks about gross receipts taxes in floor debate, those too were in the context of discriminatory taxation.[50] Increased attention

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[48] *See also* note 31, *supra*.

[49] For example, in describing the Conference Report, Senator Cannon stated:

> [T]he conference report represents an excellent piece of legislation and is a great step forward in providing more Federal assistance in developing the Nation's air transportation system without burdening passengers with locally imposed discriminatory taxation.

118 Cong. Rec. 35862 (Oct. 13, 1972).

See, e.g., 118 Cong. Rec. 22599 (June 27, 1972) (remarks of Sen. Cannon); *id.* 27815 (Aug. 10, 1972); *id.* 27816 (remarks of Sen. Cotton); *id.* 27826-27 (remarks of Sen. Hartke); *id.* 27828 (remarks of Sen. Spong); *id.* 29153 (Aug. 15, 1972) (remarks of Rep. Staggers).

[50] For example, in describing the conference report, Senator Cannon stated:

> Finally, our bill prohibits discriminatory State and local taxation on airline passengers and on the gross receipts derived from air transportation.

119 Cong. Rec. 18045 (June 5, 1973).

See id. 3348-49 (Feb. 5, 1973) (remarks of Sen. Cannon); *see also*

in the 1973 debate may be the result of increased discussion in the 1973 House Hearings of the discriminatory Ohio tax. At these hearings, the deputy tax commissioner of Ohio described the tax in more detail.[51] Officials of the ATA also testified about the problems with such a tax.[52] However, they were very clear that there was only one tax like it in the entire country and that the tax was bad not because it was imposed on airlines, but because it was imposed only on airlines, and not on other businesses. The Ohio Supreme Court agreed with this construction of the singular focus of the tax.[53] The ATA apparently had no objection to generally applicable business taxes. It only objected to additional, "discriminatory," and "special" burdens imposed on airlines.[54] Indeed, in its brief, the ATA states: "It seems

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id. 3350 (remarks of Sen. Cannon); *id.* 3352 (remarks of Sen. Pearson); *id.* 3928 (Feb. 8, 1973) (remarks of Rep. Adams in introducing legislation); *id.* 13898 (May 2, 1973) (remarks of Rep. Staggers); *id.* 13899 (remarks of Rep. Kuykendall); *id.* 13900 (remarks of Rep. Jarman); *id.* 13903 (remarks of Rep. Bingham); *id.* 13905 (remarks of Rep. Adams).

[51] *1973 House Hearings* at 246-53 (testimony of Theodore Koetz). Mr. Koetz stated, at 246: "Mr. Chairman, basically we have an airlines excise tax in Ohio which is unique, and we are probably the only State in the 50 States that has such a tax."

[52] *1973 House Hearings* at 96-101, 103-107 (testimony of Stuart Tipton). Mr. Tipton urged the Subcommittee "to again act to prevent the levying of discriminatory State or local taxes on travelers and air commerce, while providing for necessary improvements to the Nation's airport system." *Id.* at 97.

[53] *See United Airlines, Inc. v. Porterfield*, 28 Ohio St.2d 97, 276 N.E.2d 629 (1971), *appeal dismissed*, 407 U.S. 917 (1972). The Ohio court upheld the tax from a commerce clause attack stating: "the fact that the Ohio airlines excise tax is in addition to other taxes that appellant incurs in Ohio does not for that reason render it constitutionally fatal." 276 N.E.2d at 637. The other taxes United paid in Ohio included Ohio's franchise tax. *Id.* at 635.

[54] Mr. Tipton testified as follows regarding the Ohio tax:

> We urge you to take action now, to prohibit this kind of direct and indirect *discriminatory taxation* of air travelers and air commerce.
>
> *Particularly* dangerous, burdensome, and *discriminatory* in our judgment *is one State's imposition of a tax on the gross receipts derived from the sale of interstate air transportation*—a so-called airlines excise tax. This tax is levied at a rate of 4 percent on airline receipts in that State "for the privilege of engaging in the

clear that the new language prohibiting taxes on gross receipts was included for the *specific purpose* of barring taxes like the Ohio gross receipts tax." ATA Br. at 8 (emphasis added). We agree that the language in question has no preemptive effect beyond that "specific purpose."[55]

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business of transporting persons or property by air." The revenue derived from this tax is used for projects totally unrelated to aviation. Furthermore, it is levied only on airlines. *Airlines pay all other taxes generally applicable to business in the State, and yet they and their passengers are being singled out as an easy source of revenue,* whether or not airline operations in the State are profitable, and regardless of their general tax burden. *Thus, Pandora's box has been opened to another form of discriminatory taxation* on air transportation which, if allowed to proliferate in a myriad of possible forms, could deal a severe financial blow to air travelers as well as the airlines.

* * * *

* * * *The airlines pay all the taxes that other business enterprises pay in the State of Ohio.* We are taxed in the same fashion as others. *This gross receipts tax is an additional and very special burden imposed by Ohio.*

1973 House Hearings at 98-99 (emphasis added).

[55]This discovery of a broad preemptive intent is new and startling. Since the enactment of § 1513, the airlines not only have paid general business taxes measured by gross receipts to the designated states, but they have characterized § 1513 as a "ban on head taxes." *See Airport and Airway Improvement Act of 1981 Hearings on H.R. 2643, Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st sess., 546 (1981). H.R. 2643 would have defederalized the airport aid program by defining ineligible airports while rendering ineffective the preemptive language of § 1513(a) "with respect to the operation of an airport * * * during any period in which such airport is made ineligible by law to receive a grant * * * under this Act." *See id.* at LXXIV. If § 1513 was intended to have a broad preemptive effect on state taxes of general applicability, then this provision could lead to an incongruous result. Would a state's general tax still be preempted if one of its airports no longer was eligible? What if all the airports no longer were eligible? Again, this bill and the description of it by ATA as remaining a ban on head taxes indicates the general understanding of the Congress and the airlines industry that § 1513 should not be given broad preemptive effect.

Post 1973 statements and actions of the prime sponsors of the § 1513 were to the same effect. *See id.* at 158-59 (remarks of Sen. Cannon). Though not entitled to great weight, post enactment statements are relevant when made by "important figures" in the enactment of the original legislation. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 51 U.S.L.W. 4449, 4454 n. 23 (April 20, 1983).

In sum, there is no basis in the legislative history for the proposition that the brief allusion to the Ohio tax in the testimony of Mr. Gillilland and the insertion of the "gross receipts" language transforms § 1513 into a broad prohibition of taxes of general applicability which are measured by gross receipts. The evil sought to be eliminated by Congress was state user taxes, including head taxes, not the broad non-discriminatory taxes historically imposed by Hawaii and the designated states. If Congress wishes to preempt these taxes it must do so expressly, like it has done in other contexts. Here, there is no such manifestation of intent.

CONCLUSION

In issue are the general business taxes of eleven states as applied to airlines. The airlines and their association would have the Court overturn that application of those taxes by oversimplified construction of the federal statute, allegedly preemptive, and by selective recourse to legislative history which fails to support the broad reach appellants attribute to the statute.

This Court has consistently struck the sensitive federal-state balance where the state taxing power is at risk. In the current term, the Court has refused, even where the interests of the federal government itself were concerned, to find interference with a federal function from a tax non-discriminatory in its practical application. *Washington v. U.S.*, 103 S.Ct. 1344 (1983). Yet it has found other forms of taxation constitutionally infirm where a business or activity is singled out for special treatment. *Minneapolis Star v. Minnesota Comm'r of Rev.*, 103 S.Ct. 1365 (1983). The federal statute at issue does no more than to invalidate this type of discriminatory tax together with those other taxes which are not the concern of the *amici* states here.

The Court, as it has on prior occasions, may properly require more from the statute and its underlying history than is shown here before precluding the operation of these state taxes of general application. The decision of the Supreme Court of Hawaii should be affirmed.

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APPENDIX

FEDERAL STATUTES

49 U.S.C. § 1513.

(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or in the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possession of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or

possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans, the provisions of subsection (a) of this section shall not apply to such authority until December 31, 1973.

49 U.S.C. § 1301.

As used in this chapter, unless the context otherwise requires—

* * *

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

* * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * *

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for

compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * *

(23) "Intrastate air transportation" means the carriage of persons or property as a common carrier for compensation or hire, by turbo-jet powered aircraft capable of carrying thirty or more persons, wholly within the same State of the United States.

STATE STATUTES

Alaska Statutes (1978)

Sec. 43.70.020. Application for license. (a) For the privilege of engaging in a business in the state, a person shall first apply, upon forms prescribed by the commissioner, and obtain a license so to do, and pay the license fee provided for in § 30 of this chapter. A license issued to a firm for a particular line of business covers all its operation in the state in the lines of business regardless of the number of its establishments. * * *

Sec. 43.70.030. Levy and computation of license fee. (a) The license fee for each business is $25 plus a sum equal to one-half of one per cent of the gross receipts in excess of $20,000 from the business during the year for which the license is issued, except that all gross volume in excess of $10,000 a year is taxed at the rate of one-quarter of one per cent. * * *

Sec. 43.70.110. Definitions. In this chapter, unless the context otherwise requires, the following words have the meanings indicated.

(1) "Business" includes all activities or acts, personal, professional or corporate, engaged in or caused to be engaged in, or following or engaging in a trade, profession, or business, including receipts from advertising services, rental of personal or real property, construction, processing, or manufacturing, but excluding fisheries

businesses, fishermen, liquor licenses, insurance businesses, mining, and coin-operated amusement and gaming machines, calling or vocation, with the object of financial or pecuniary gain, profit or benefit, either direct or indirect, and not exempting subactivities producing marketable commodities or services used or consumed in the main business activity, each of which subactivities shall be considered business. The giving or supplying of services as an employee and the furnishing of property, services, substances, or other things, by a person who does not hold himself out as regularly engaging in those transactions, does not constitute business under the meaning of this chapter.

Arizona Revised Statutes

§ 42-1309

A. There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42-1310, 42-1310.02, 42-1311, 42-1312, 42-1312.01 and 42-1313 through 42-1315.

§ 42-1310

The tax imposed by § 42-1309, subsection A shall be levied and collected at the following rates:

* * *

2. At an amount equal to one per cent of the gross

proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:

* * *

(d) Transporting for hire freight or passengers by railroads or aircraft from one point to another point in the state.

Delaware Code

Title 30, § 2301

(b) Upon every person engaging or continuing to engage in any service industry, business, calling or profession not otherwise specifically licensed and taxed under subsection (a) of this section, there is hereby levied and there shall be collected an annual general service license fee of $50.

* * *

(d) (1) In addition to the license fee required by subsections (a) and (b) of this section, every person shall pay an annual license fee payable in quarterly installments on or before the twentieth day of each of the months of April, July, October and January of each year at the rate of 4/10 of 1 percent of the aggregate gross receipts paid to such person during the last preceding 3-month period ending on the last date of the months of March, June, September and December. The quarterly returns shall be accompanied by a certified statement on such forms as the Department of Finance shall require in computing this fee due.

(2) Notwithstanding paragraph (1) of this subsection, if the aggregate gross receipts prescribed by paragraph (1) for any calendar quarter does not exceed $6,000, the return and payment of the additional license fee imposed for such quarter shall be filed on or before the 20th day of the 1st month following the close of the 1st subsequent calendar quarter in which the aggregate gross receipts for such quarter exceeds $6,000, or, if that does not occur, on the

20th day of the 1st month following the close of the 4th calendar quarter of the calendar year.

Indiana Code

§ 6-2.1-2-2. Imposition of gross income tax. — (a) An income tax, known as the gross income tax, is imposed upon the receipt of:

(1) The entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and

(2) The taxable gross income derived from activities or businesses or any other source within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

(b) The receipt of taxable gross income is subject to the applicable rate of tax fixed under section 3[6-2.1-2-3] of this chapter. The rate of tax is determined by the type of transaction from which the taxable gross income is received.

§ 6-2.1-2-3. Tax rates. * * *

(b) The receipt of gross income from transactions described in section 5 [6-2.1-2-5] of this chapter is subject to the following rates of tax:

Calendar Year	Rate of Tax
1976	1.60%
1977	1.55%
1978	1.50%
1979	1.45%
1980	1.40%
1981	1.35%
1982	1.30%
1983	1.25%
1984	1.20%
1985	1.15%
1986	1.10%
1987	1.05%
1988	1.0 %
1989	.95%
1990	.90%

For each calendar year following 1990, the rate of tax shall reduce five hundredths of one percent [.05%] from the rate for the preceding calendar year, and after December 31, 2007, no tax shall be imposed under this chapter.

§ 6-2.1-2-5. Classifications under 6-2.1-2-3(b). — The receipt of gross income from the following is subject to the rate of taxation prescribed in section 3(b) [6-2.1-2-3(b)] of this chapter:

* * *

(3) Operating a steam or electric railway, streetcar line, motor vehicle, steam or motorboat, or any other vehicle for the transportation of freight, express, or passengers for hire; * * *

Maryland Code

Title 81, § 130. Imposition of tax.

(a) *Generally.* — A state franchise tax is levied annually measured by the gross receipts for the preceding calendar year of the following classes of foreign or domestic companies doing business in this State, at the following percentage rates of gross receipts:

(1) Telegraph, cable, express, transportation, (excluding railroad), parlor car, or sleeping car companies, at 2½ percent.

Mississipi Code

§ 27-65-13. Tax levied.

There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

§ 27-65-19. Public utilities.

* * *

(2) Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this state, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business, except persons operating local transit busses shall be exempt from such tax; and upon persons operating taxicabs within municipalities and within four miles thereof, there shall be collected a tax equal to two per cent of the gross income of the business.

New York Code

§ 184. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, [shall pay] for the privilege of exercising its corporate franchise, or [carrying on its] *of doing* business, *or of employing capital, or of owning or leasing property in this state* in [such] *a* corporate or organized capacity [in this state, an excise], *or maintaining an office in this state, shall pay a franchise* tax [or license fee] which shall be equal to three-quarters of one per centum upon its gross earnings from all sources

within this state [, excluding earnings derived from business of an interstate character. Provided, however, gross earnings from transportation or transmission business both originating and terminating within this state and traversing both this state and another state or states or country shall be subject to the excise tax or license fee imposed by this section and such earnings shall be allocated to this state in the same ratio that the mileage within the state bears to the total mileage of such business. A corporation which has made an election under paragraph three of section seven hundred nine of this chapter shall include as part of its gross earnings under this section, without the exclusion provided herein, the gross earnings required to be included under the provisions of such paragraph.]

Oklahoma Statutes

Title 68, § 1354. Tax Levy—Rate—Sales Subject to Tax

There is hereby levied upon all sales, not otherwise exempted in this article, an excise tax of two percent (2%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property;

(B) Natural or artificial gas, electricity, ice, steam or any other utility or public service, except water and those specifically exempt under Section 1357 of this Code;

(C) Transportation for hire to persons by common carriers, including railroads, both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines and other means of transportation for hire;

Revised Code of Washington

82.16.010 Definitions. For the purposes of this chapter, unless otherwise required by context:

* * *

(11) "Public service business" means any of the businesses defined in subdivisions (1), (2), (3), (4), (5), (6), (7), (8), (9), and (10) or any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto, or any business hereafter declared by the legislature to be of a public service nature. It includes, among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, log patrol, pipe line, warehouse, toll bridge, toll logging road, water transportation and wharf business.

82.16.020 Public utility tax imposed. There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:

(1) Railroad, express, railroad car, water distribution, light and power, telephone and telegraph businesses: Three and six-tenths percent;

(2) Gas distribution business: Three percent;

(3) Urban transportation business: Six-tenths of one percent;

(4) Vessels under sixty-five feet in length, except tugboats, operating upon the waters within the state: Six-tenths of one percent;

(5) Motor transportation and tugboat businesses, and all public service businesses other than ones mentioned above: One and eight-tenths of one percent.

West Virginia Code

Article 12A, § 11-12A-2.

Every motor vehicle carrier operating on the public highways of this State and every railroad car carrier, railroad carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft, for the transportation of passengers or freight, doing business

in the State shall pay to the State an annual tax for each calendar year. This tax shall be equal to the gross income from all business beginning and ending within the State multiplied by the respective rates as follows: Motor vehicle carriers, railroad car carrier, railroad carrier, express companies, pipeline companies, airline companies, any person operating a steamboat or other watercraft and telegraph companies, three and three-tenths percent, and telephone companies, three and seventy-four one-hundredths percent: Provided, that any motor vehicle carrier which is an urban or suburban bus line shall be taxed at the rate of one and sixty-five one-hundredths percent of such gross income and any motor vehicle carrier which is a taxi or cab company or a company which hauls waste, refuse or garbage shall be taxed at the rate of two and five-tenths percent of such gross income: Provided, however, that a motor vehicle carrier which transports goods within the State of West Virginia and which received those goods as a connecting carrier in an uninterrupted continuation of interstate transportation done under the authority of a certificate of convenience and necessity issued by the interstate commerce commission, shall be taxed pursuant to subdivision (a) of section three [§ 11-12A-3] of this article. This provision shall apply only to the transportation of goods carried within the State without a container change or warehousing.

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No. 82-585
No. 82-586

In The
Supreme Court of the United States
October Term, 1982

ALOHA AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

HAWAIIAN AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND AMICUS CURIAE BRIEF, OF THE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES

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No. 82-585
No. 82-586

In The
Supreme Court of the United States
October Term, 1982

HAWAIIAN AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE, DIRECTOR OF TAXATION, STATE OF HAWAII[1]

The Multistate Tax Commission, its member states, and the States joining in this motion and attached *amicus* brief are vitally interested in the ability of the States to exercise their sovereign taxing powers without undue restraints. For the reasons set forth in the attached *amicus* brief, and for the reasons set forth in the Statement of Interest contained in that brief, the Multistate Tax Com-

[1]Although the State of Hawaii consented to the filing of an *amicus* brief by the Air Transport Association of America, Counsel for Hawaiian Airlines has refused to consent to the filing of an *amicus* brief by the Multistate Tax Commission. The Commission's brief is prepared on behalf of itself, its member states, and the states specifically participating in the brief.

mission hereby requests permission to file the attached *amicus* brief in support of the position of the State of Hawaii. The Multistate Tax Commission makes this motion only for the case of *Hawaiian Airlines, Inc. v. Director of Taxation, State of Hawaii,* No. 82-586 because Hawaiian Airlines, Inc. has refused to consent to the filing of this *amicus* brief. Aloha Airlines, Inc. has filed a consent letter with this court for the companion case of *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii,* No. 82-585.

The Multistate Tax Commission, as a multistate agency, is concerned that the broad implications of this decision will affect not only those states that allegedly levy annual general business taxes on airline gross receipts[2] but also will affect all states that have general business or property taxes that are measured in whole or in part by gross receipts or gross income derived from air transportation.

Because the Multistate Tax Commission's interest in this case is as significant as that of the United States and the Air Transport Association of America as *amici,* the Multistate Tax Commission respectfully files this Motion for Leave To File the attached *amicus* brief.

Respectfully submitted,

EUGENE F. CORRIGAN
Executive Director
Multistate Tax Commission

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[2]See the states designated in the Br. for the United States at 11 nn.15 & 16.

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BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES[3]

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the MTC) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact), entered into currently by nineteen states and the District of Columbia as full members, and by

[3]This brief is submitted by the Multistate Tax Commission and participating states in support of the Appellee State of Hawaii. Aloha Airlines has consented to the filing of this brief. The original of the consent letter from Aloha Airlines is on file with the Clerk of the Court.

eleven states as associate members.[4] The purposes of the Compact include the promotion of uniformity or compatibility in significant components of tax systems.[5]

The MTC is vitally interested that this Court uphold the well-reasoned decision and judgment of the Hawaii Supreme Court in *In re Tax Appeal of Aloha Airlines, Inc.*, 65 Hawaii —, 647 P. 2d 263 (1982). No legislative history or Congressional policy exists to support the airline's argument that Congress intended to exempt airlines from a state's nondiscriminatory general state taxes (property, franchise, net income, sales and use taxes, etc.) simply because some states have historically chosen to measure some of their general business taxes, including property taxes or taxes in lieu of property taxes, by gross income or gross receipts. To our knowledge, Congress has never granted any business an isolated specific exemption from state taxation. Nevertheless, the Solicitor General and the Air Transport Association of America (hereinafter referred to as the ATA) argue that all state taxes on airlines are invalid under the supremacy clause to the extent measured by gross receipts from air transportation.[6] More specifically, the Solicitor General argues that, to the extent measured by gross receipts, the general business

---

[4]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and West Virginia. The associate members are the states of Alabama, Arizona, Georgia, Louisianna, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania and Tennessee.

[5]The constitutionality of the Compact was upheld by the United States Supreme Court in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U. S. 452 (1978), *aff'g* 417 F. Supp. 795 (S. D. N. Y. 1976).

[6]"Subsections (a) and (b) therefore are entirely consistent with one another. Subsection (a) clearly bars all State taxes on gross receipts from air carriage. It does so without regard to what the tax is called or how it is labelled by the State." Br. of ATA at 6. See also Br. for the United States at 11.

taxes of the following states fall under the axe of Section 1513: Delaware, Indiana, Maryland, Washington, and West Virginia. (Br. for the United States at 11.)

Because we believe that Congress intended that Section 1513 apply fairly and evenhandedly towards all airlines in all the states, we urge this Court to strike down the belated effort of the airlines, the ATA, and the Solicitor General to construe Section 1513 (a) to produce this arbitrary and unreasonable result.

STATUTES INVOLVED

49 U. S. C. 1513, as amended by Section 532 of the Airport and Airway Improvement Act of 1982,[7] Pub. L. No. 97-248, 96 Stat. 701 provides in pertinent part:

> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . . .
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. . . .

Hawaii Rev. Stat. 239-6 (1976) (bracketed material added) provides in pertinent part as follows:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a special rate schedule for students . . . the tax shall be three per cent. . . . The tax imposed by this section is a means of tax-

[7] This Act is Title V of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

ing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [General Excise Tax Law of Hawaii] but is not in lieu of any other tax.

In material part, Internal Revenue Code (I. R. C.) Chapter 33 Subchapter C (titled Transportation by Air) lists the taxes imposed by Congress as follows:

SEC. 4261. Imposition of tax

(a) In general.—There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 8 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

. . . .

(c) Use of international travel facilities.—There is hereby imposed a tax of $3 upon any amount paid (whether within or without the United States) for any transportation of any person by air, if such transportation begins in the United States. This subsection shall not apply to any transportation all of which is taxable under subsection (a) (determined without regard to sections 4281 and 4282).

(d) By whom paid.—Except as provided in section 4263 (a), the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

. . . .

SEC. 4263. Special rules.

(a) Payments made outside the United States for prepaid orders.—If the payment upon which tax is imposed by section 4261 is made outside the United States for a prepaid order, exchange order, or similar order, the person furnishing the initial transportation pursuant to such order shall collect the amount of the tax.

. . . .

PART II—PROPERTY

SEC. 4271. Imposition of tax.

(a) In general.—There is hereby imposed upon the amount paid within or without the United States for the taxable transportation (as defined in section 4272) of property a tax equal to 5 percent of the amount so paid for such transportation. The tax imposed by this subsection shall apply only to amounts paid to a person engaged in the business of transporting property by air for hire.

(b) By whom paid.—

(1) In general.—Except as provided by paragraph (2), the tax imposed by subsection (a) shall be paid by the person making the payment subject to tax.

(2) Payments made outside the United States.—If a payment subject to tax under subsection (a) is made outside the United States and the person making such payment does not pay such tax, such tax—

(A) shall be paid by the person to whom the property is delivered in the United States by the person furnishing the last segment of the taxable transportation in respect of which such tax is imposed, and

(B) shall be collected by the person furnishing the last segment of such taxable transportation.

SUMMARY OF ARGUMENT

Hawaii Rev. Stat. Ch. 239 imposes a tax on all public utilities, including all intrastate air, sea, and land carriers. After *Railway Express Agency, Inc. v. Virginia*, 358 U. S. 434 (1959) (hereinafter referred to as *REA II*), the Hawaii legislature revised the tax laws with respect to public utilities and intrastate carriers in order to in-

clude them under the protective umbrella of *REA II*.[8] Although the existing public utilities tax had been held to be in the nature of a property tax,[9] the legislature revised the tax to expressly define the tax as a tax levied on property. The PSC Tax on airlines and other carriers therefore constitutes a property tax, or other general business tax, expressly permitted by Section 1513 (b). After carefully reviewing the history and the nature of the Hawaiian PSC Tax, the legislative history of Section 1513, and the judicial standards employed to determine when a state statute is preempted by an act of Congress, the Hawaii Supreme Court properly and logically concluded that the PSC Tax did not conflict with Section 1513.

Nevertheless, the airlines, the ATA, and the Solicitor General (hereinafter referred to as the airlines and their *amici*) argue that the PSC Tax is invalid to the extent it is imposed on airlines and to the extent it is measured by gross receipts[10] from the transportation of persons by air between the islands of Hawaii. The airlines and their

---

[8]

> The purpose of this bill is to protect, from attacks of, unconstitutionality on the basis of the commerce clause the tax on public utilities, airlines, motor carriers, and contract carriers by clearly characterizing the tax as a property tax, measured by gross income. Although the present public utility tax is in the nature of the property tax, it is not clearly defined as a tax in lieu of property taxes as in this bill.

House Standing Comm. Rep. No. 792 (Finance Comm.), *reprinted in* 1963 House Journal 799. See also House Standing Comm. Rep. No. 850 (Ways and Means Comm.), *reprinted in* 1963 Senate Journal 950.

[9] *Hawaii Consolidated Ry. Ltd. v. Borthwick*, 34 Hawaii 269, 281 (1937), *aff'd*, 105 F. 2d 286 (9th Cir. 1939).

[10] " 'Gross income,' 'gross proceeds,' and 'gross receipts' all mean the same." 2 T. Cooley, *The Law of Taxation* 1789 (4th ed. 1924). For a discussion of gross receipts, see generally *id.* at 1710-11, 1785-91.

amici claim that their position is supported by the language of Section 1513 (a), Congressional policy in enacting both ADAP and Section 1513, and by the legislative history of Section 1513 and ADAP.

On the contrary, Section 1513(b) specifically exempts Hawaii's PSC Tax from the preemptive provisions of Section 1513(a). This construction of Section 1513 is amply supported not only by the express language of Section 1513, but also by volumes of legislative history,[11] by appropriate rules of statutory construction (including those applicable to preemptive federal legislation), by Congressional intent to only preempt state taxes that conflict with certain federal taxes paid by *users* of air transportation, and by the Congressional policy and purpose in enacting the Airport Development Air Program (hereinafter referred to as ADAP).

The Solicitor General submits that Congress intended to prevent "forbidden taxes on gross receipts" from continuing "to erode the retained earnings, or ultimately the capital reserves of airlines, while *they* or their customers are at the same time obligated to provide federal revenues to fund ADAP projects throughout the Nation, including those in Hawaii." Br. for the United States at 12 (emphasis added). The legislative history to section 1513 and the three federal user taxes enacted by Congress demonstrate that Congress addressed taxes *on users* of air transportation. Because Congress has not imposed any specific taxes on *airlines* for airport development and because Congress did not address general nondiscriminatory taxation of airline companies, the Solicitor General's use of the word "they" is deceptively wide of the mark.

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[11]See the lengthy appendix of legislative history submitted by Hawaii under separate cover in this cause, hereinafter cited as Leg. Hist. App.

The MTC and participating states strongly believe that Congress' preemption by Section 1513(a) of specific excise taxes on users of air transportation does not exempt the airlines from general business or property taxes that are expressly permitted by Section 1513(b). Congress did not intend to exempt airlines from general business or property taxes on the fortuitous circumstances that these general taxes were traditionally measured in part by gross receipts from air transportation. The extensive legislative history addresses three major subjects: user taxes (those enacted in I. R. C. 4261 and 4271); head taxes; and Ohio's discriminatory tax upon a single business, the airline companies. Nothing in the legislative history addresses general business or property taxes imposed on airlines; nothing in the legislative history supports a Congressional intent to exempt airline companies from these state taxes. The language of Section 1513(b) illustrates the contrary—that Congress specifically intended to exclude general business taxes and property taxes from the prohibition contained in subsection (a). These general business taxes apply to all business and do not discriminate against the airline companies like the Ohio tax did. During the 1973 House Hearings, Ohio's Deputy Tax Commissioner properly told Congress that the Ohio Airlines Tax was "unique" and that Ohio was "probably the only State in the 50 States that has such a tax."[12] Further, the revenues from general state business or property taxes, such as the Hawaii PSC Tax, pay for general governmental services and benefits. They are not imposed

[12]Bills to Amend the Airport and Airway Development Act of 1970: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. 246 (Mar. 14, 15, 20, 22, & 27, 1973) (Leg. Hist. App. at 142).

upon airport users and the revenues are not intended for airport development. Thus, no reasonable construction of Section 1513(a) supports the position of the airlines and their *amici* in these causes.

ARGUMENT

The broad fundamental issue in this case is to ascertain the Congressional policy embodied in both ADAP and the state tax restrictions contained in 49 U. S. C. 1513. The narrow issue is one of statutory interpretation. The controlling inquiry is first to determine the intent of Congress in enacting Section 1513, and then to determine whether Hawaii Rev. Stat. 239-6 conflicts with this Congressional intent. This brief thus begins with an examination of the legislative history of Section 1513.

I. The Legislative History of 49 U. S. C. 1513 Illustrates No Congressional Intent to Prohibit the Imposition of General Business Taxes, Such As the Hawaii PSC Tax that is Imposed on All Utilities.

A careful examination of the legislative history of S. 38, the bill creating the section codified as 49 U. S. C. 1513, demonstrates that Congress intended to preempt one type of tax only, a tax generally characterized as a "head tax."[13]

In the Senate Report on S. 38,[14] the bill is characterized as having the twofold purpose of: (1) increasing

[13]A head tax is a "per person" tax usually identical on every individual in a class or group. As an air transportation tax, it is usually levied on common carrier passengers on a per-passenger basis. It may be a flat rate tax or a percentage of fare tax. A head tax may be collected directly from the passenger in the form of a boarding or enplaning fee, or imposed upon a carrier and collected indirectly. *See generally*, S. Rep. No. 93-12, 93rd Cong., 1st Sess. (Feb. 1, 1973), *reprinted in* 1973 *U. S. Code Cong. & Ad. News 1434* (Leg. Hist. App. at 108).

[14]*Id.* (Leg. Hist. App. at 108).

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federal financial assistance for airport development; and (2) prohibiting "the levying, by State and local governments, of passenger 'head' taxes or use taxes on the carriage of persons in air transportation."[15] Thus, Congress had two goals.[16] It wanted to increase federal funding for airport development "because of the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the nation's system of publicly-owned airports."[17] In tandem with this purpose, it recognized

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For illustrative purposes, this brief concentrates on the 1973 Senate Report 93-12 that accompanied S. 38. This bill "is nearly identical to" (119 Cong. Rec. 213) S. 3755, the 1972 version passed by both the Senate and the House but pocket vetoed for budgetary reasons by President Nixon. All of the legislative history—conference reports, bill reports, excerpts in the Congressional Record, and committee hearings—mirrors the content of this 1973 Senate Report, which serves as an accurate representative sample of all the legislative history.

[15]1973 Senate Report, *supra* note 13, at 4 (Leg. Hist. App. at 110).

[16]That these two goals were considered inseparable is emphasized throughout the report. In the "Conclusion" to the report, the Committee states:

> Nonetheless, the Committee views S. 38 as an aviation development package—the components of which cannot be separated. We believe that if the prohibition on *local head taxes* was not a part of the total new program, there would be need to re-evaluate the increased Federal funding for airport development projects called for in S. 38. If *local taxes* on passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program. If *local head taxes* become a significant airport funding mechanism the public interest may well require a reduction in Federal user taxes and a diminution of Federal participation in airport development projects.

Id. at 26 (emphasis added) (Leg. Hist. App. at 122).

[17]*Id.* at 4 (Leg. Hist. App. at 111).

the need to prevent other government agencies from establishing passenger head taxes.

The funds for this projected airport development were to come from user taxes on aviation system users. Congress intended to ensure that these user taxes would be uniformly imposed and that local head taxes would "not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation."[18]

That Congress intended to prohibit only head taxes is emphasized throughout the Senate Report. Explaining the prohibition on head taxes, the report states:

> This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax. This provision will be discussed later but the Committee points out here that in denying government agencies potential revenues from passenger head taxes, it is also responding to the local need for greater Federal assistance in airport grants.[19]

The 1973 Senate Report demonstrates that Congress was deeply concerned with the direct burden local head taxes would place on individual air passengers. Congress feared the possible proliferation of local head taxes in the aftermath of *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972), which held that a local head tax on airline passengers did not violate the commerce clause.[20] This concern is expressed in

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[18] *Id.*

[19] *Id.* at 11-12 (Leg. Hist. App. at 112).

[20] The entire text of the *Evansville* decision was reproduced in both 1972 Senate Hearings and the 1972 House Hearings:

Bills to Amend the Airport and Airway Development Act of 1970: Hearings on S. 2397, S. 3302, S. 3611, and S. 3755 Before the Subcomm. on Aviation of the Senate

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detail at page 17 (Leg. Hist. App. at 112-13) of the 1973 Senate Report:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

This portion of the report is followed by several pages of newspaper articles describing the reaction of

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Comm. on Commerce, 92d Cong., 2d Sess. 241-60 (Apr. 25 & 26, June 12, 1972); Bills Concerning State Taxation and the Federal Share of Funds to be Used for Airport Construction, Maintenance, and Improvements: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and identical bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. 2-23 (June 19 & 23, 1972).

Apparently, Congress was not only concerned with the results of the *Evansville* decision, but Congress was totally unprepared for the outcome of the decision itself:

> This Committee never intended that air travelers would be subject to state and local head taxes as well as to national user charges. The Committee believed there was no danger of this because the basic constitutional guarantee of a citizen's right to unhindered interstate travel, and a U. S. Supreme Court decision which had prevailed since 1867, indicated that such taxes could not be constitutionally imposed.

Id. at 21 (Leg. Hist. App. at 118-19).

individual air passengers to the imposition of head taxes. The articles are replete with quotes from irate air passengers. Congress was concerned with:

> [T]he chaos which such local taxation works on the national transportation system. The head tax brings on confusion, delay, anger and resentment and cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes."[21]

In addition, the 1973 Senate Report includes a table of thirty-one jurisdictions charging head taxes.[22]

While, the Commerce Committee was primarily concerned with the imposition of a head tax directly on the passenger, it was also concerned with potential indirect imposition of head taxes on the airlines as well. The Committee states:

> Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel.
>
> If the passenger must pay a local head tax, it adds directly to the cost of his trip. And if head taxes are absorbed by the carriers, where law permits, because of the cost and difficulty of collection, or even refusal of passengers to pay, it still will lead to increased air travel costs. If the carriers had to absorb $1 for every air passenger carried last year, that would amount to $170 million. The airlines could not reasonably be expected to bear such a burden. In the end, a fare increase would have to be imple-

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[21] *Id.* at 17 (Leg. Hist. App. at 113).

[22] *Id.* at 21. Throughout the history of debates in the Congressional Record, the increasing number of jurisdictions levying head charges was closely monitored. The last tally occurs in 119 Cong. Rec. 17,345 (May 30, 1973):

> The main purpose of this bill as the members recall is to ban the so-called airport head tax. We had seven of these taxes when we considered the legislation last year. This year we have 44.

mented. Thus, the air passenger loses either way on state and local head taxes. In addition, there would come a point when this added cost could make air travel uneconomical for some people, and thus inhibit the growth of the air transportation system, particularly in short-haul markets.[23]

This reasoning explains the inclusion in Section 1513 (a) of the phrases "directly or indirectly" and "on the carriage of persons traveling in air commerce." Congress was also concerned with discriminatory taxes against airlines, such as Ohio's tax. See *supra* p. 10. These twin concerns explain the inclusion of "on the sale of air transportation or on the gross receipts derived therefrom." Congress thus intended to prohibit "head taxes" (whether imposed on the users or imposed in the form of a discriminatory tax levied only on airlines) and to prohibit them in any form, including a percentage of fare tax. The inclusion of this language thus prohibited local governments from enacting a "pass-on head tax:" imposing a head tax by actually calling it something else or by collecting it from the airline rather than from the airline passenger. The airlines and their *amici* argue that because the statute includes the words "directly or indirectly" and "gross receipts," Congress intended to prohibit all state taxation of air carriage to the extent *measured by* gross receipts. This argument is incorrect, flies in the face of the legislative history of Section 1513, and flies in the face of the exception provisions in Section 1513(b).

In addition, although not raised in the court below, if Congress intended to prohibit the states from exercising their general taxing powers, this Congressional prerogative may encroach upon the states' power to tax as

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[23] *Id.* at 22 (Leg. Hist. App. at 19-20).

traditionally reserved to the states by the tenth amendment. As early as 1819, this Court stated as follows:

> [t]hat the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union . . . are truths which have never been denied.[24]

In *Gibbons v. Ogden*, the Court further recognized that

> [t]he power of taxation is indispensable to their [the states] existence . . . . Congress is not empowered to tax for those purposes which are within the exclusive province of the states.[25]

In a more modern context, this Court has further recognized the existence of

> limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. . . . The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity of their ability to function in a federal system.[26]

Assuming arguendo that Congress intended to prevent the states from levying general business taxes or property taxes measured by gross receipts, this exercise of power may be barred by the tenth amendment. This constitutional issue, although not directly raised in these cases, should be considered by this Court in its construction of Section 1513.

II. Congress Intended that Subsection (a) Preempt State Taxes Similar to the Three Federal User Taxes Previously Enacted in 1970 by Congress.

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[24] *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 425 (1819).

[25] 22 U. S. (9 Wheat.) 1, 199 (1824).

[26] *National League of Cities v. Usery*, 426 U. S. 833, 842-43 (1976).

An examination of the user taxes actually enacted by Congress, in light of the similar taxes prohibited in subsection (a), suggests a reasonable and logical interpretation of Section 1513 which conforms to legislative history and Congressional policy. Congress imposed three taxes on the users of air transportation: (1) an 8% tax on the price of domestic passenger tickets (required to be paid by the purchasers of the tickets); (2) a $3 head tax on international travelers (required to be paid by international travelers); and (3) a 5% tax on the cost of air freight (required to be paid by the persons shipping the freight).[17] These three federal user taxes represent the *subjects of taxation* expressly prohibited by Congress in Section 1513(a).

The three subjects of taxation expressly prohibited by Section 1513(a) closely parallel the three federal user taxes. The 8% tax on the price of domestic passenger tickets is clearly a tax imposed on persons traveling in air commerce and indirectly a charge on the carriage of persons traveling in air commerce. The $3 head tax on international travelers is clearly a head charge on persons traveling in international air commerce. A 5% tax on the cost of air freight is clearly a tax on the sale of air transportation.

Congress was extremely concerned with the potential for local duplication of these federal taxes, directly (the local governments collected the tax) or indirectly (the airlines were required to collect the tax), on *users* of air transportation. Congress justifiably feared that local user taxes would conflict with the policies and goals of ADAP by duplicating federal user taxes already imposed by Congress—on persons using air transportation—to finance

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[17] The texts of these taxes are reproduced in this brief above at pp. 6-7. See also Br. of the United States at 7.

airport development and safety. This Congressional concern was justified following *Evansville*. Congress was also undoubtedly concerned with any *discriminatory* taxes, such as the Ohio tax, that singled out either users of air transportation or airline companies for unfair and burdensome taxes.

When the language of Section 1513(a) is interpreted to conform with these policies and goals of ADAP, it readily evidences logical, reasonable, and harmonious restrictions on the taxing powers of the states and their political subdivisions. This interpretation of Section 1513(a) easily reconciles with the language of 1513(b), which excludes nondiscriminatory general business or property taxes imposed on airlines from the reach of Section 1513(a). If these policies and goals are ignored or misstated, and subsection (b) of Section 1513 is ignored (as they are by the airlines and their *amici*), Section 1513 is divorced from any semblance of reasonableness or logic.[28]

III. The Purpose of Subsection (b) is to Narrow the Scope of Subsection (a).

The purpose of Congressional enactment of subsection (b) was to ensure that subsection (a) would not be interpreted to prohibit *taxes* (subjects of taxation—not their measures) that were not enumerated in subsection (a).

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[28]As construed by the airlines and their *amici*, Section 1513(a) gives airlines general business tax or property tax immunity in those states that have historically measured their general business or property taxes by gross receipts, rather than measuring these taxes by other available measures. No reason can possibly exist, as evidenced by the silence in the legislative history, to explain the argument of the airlines and their *amici* that Congress intended to prohibit selected general business taxes measured by gross receipts while also permitting all other general business taxes imposed on airlines to remain intact. This arbitrary distinction has no rational relationship with, and furthers no policy of, the Congressional purpose in enacting ADAP.

When subsection (b) is considered in interpreting subsection (a), and when the federal user taxes actually imposed by Congress and legislative purpose and history are also considered, it is clear that Congress intended to preempt only those state taxes that encroached upon the federal scheme. When Section 1513(a) is viewed in this context, seven items are relevant: (1) This Court's decision in *Evansville* is closely associated with the problem that Section 1513(a) was enacted to solve; (2) Section 1513(a) was specifically enacted to prohibit taxes *imposed on* persons or the carriage of persons traveling in air commerce, as well as taxes *imposed on* the "sale of air transportation or on the gross receipts derived therefrom"; (3) Congress intended that the states were only precluded from taxing the *subjects of taxation* specifically enumerated in subsection (a); (4) subsection (b) explicitly explains that subsection (a) does not apply to property taxes, net income taxes, franchise taxes, sales or use taxes on the sale of goods or services (including airline services), or to comparable general taxes; (5) the only federal user taxes imposed by Congress to fund the ADAP trust fund were taxes imposed on persons using air transportation: no taxes were imposed on airlines; (6) *nothing* in the legislative history of Section 1513 evidences a Congressional intent to relieve airline companies of any general taxes imposed on them as a part of a state's traditional general business or property tax program; and (7) the only manner in which subsections (a) and (b) can be construed to produce a harmonious whole is to realize that subsection (a) prohibits specific *subjects of taxation* (the legal incidences of taxation) and not the *measures* of the general taxes that are permitted by subsection (b).

In sum, subsection (a) should be limited to a very narrow class of *subjects of taxation*: specific excise taxes

imposed upon users of air transportation, not general business taxes or property taxes to the extent measured by gross receipts.

IV. The "On the Gross Receipts Derived Therefrom" Language in Subsection (a) Refers to a Narrow Subject of Taxation (Taxes on Gross Receipts) and Does Not Prohibit General Business Taxes Measured By Gross Receipts: A Tax on Property Measured By Earnings Is Different From A Tax On Earnings.

A vast difference separates the subject or legal incidence of a tax (*what the tax is imposed on*) from the measure of a tax (*how the tax is computed*). Furthermore, courts have long recognized the difference between these related, but analytically separate, concepts. A corporate franchise tax imposed on the privilege of conducting a business in a state measured by gross receipts is a franchise tax, *not a tax on gross receipts* from *sales*. A property tax measured by gross receipts is a property tax, *not a tax on gross receipts* from *sales*.[19]

More specifically, a vast difference separates a tax imposed *on the gross receipts from the sale* of air transportation and a *property tax* (the PSC Tax) *measured by gross receipts* from the airline business. Further, the legal incidence of a tax on the sale of air transportation is *on the sale*. *The sale* of air transportation represents both the subject of taxation and the taxable legal incidence. Tax liability is triggered by *a sale*. The taxable event or incidence occurs where the sale takes place. An example of this tax would be a tax imposed on the *sale* of airline tickets or on the *sale* of airline freight transportation. This hypothetical tax is analogous to the ADAP taxes actually

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[19]See generally the cases cited by counsel in *Pacific Co. v. Johnson*, 285 U. S. 480, 486 (1932).

enacted by the federal government in these cases. This tax has nothing to do with the actual furnishing of transportation within the state. It is simply imposed on a local incidence—a sale—which could take place in any state regardless where the transportation services are actually rendered by the airlines. In contrast, the legal incidence of a corporate franchise tax is where the corporate franchise tax privilege is exercised and its measure must be related to the exercise of the corporate privilege. The legal incidence of a property tax occurs when the property (tangible or intangible) is owned and used in the taxing state.

That the *measure* of a tax permitted by subsection (b) can include income from a *subject* of taxation prohibited by subsection (a) is specifically supported by numerous decisions of this Court regarding the inclusion of exempt federal government obligations in state corporate franchise taxes that were measured by property, net worth, or net income. *See Werner Machine Co. v. Director of Division of Taxation,* 350 U.S. 492 (1956); *Pacific Co. v. Johnson,* 285 U.S. 480 (1932); *Educational Films Corp. v. Ward,* 282 U.S. 379 (1931); *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911); *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902); *Home Ins. Co. v. New York,* 134 U.S. 594 (1890); *Society for Savings v. Coite,* 73 U.S. (6 Wall.) 594 (1867); *Provident Institution v. Massachusetts,* 73 U.S. (6 Wall.) 611 (1867); *Hamilton Co. v. Massachusetts,* 73 U.S. (6 Wall.) 632 (1867). As stated in *Werner Machine*: "This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property." (350 U.S. at 494).

In addition, this Court has traditionally differentiated between a *subject of taxation* and its *measure* in determining the scope of implied immunity granted taxpayer under the Supremacy Clause of the United States Constitution. *See* Br. for Appellee at note 41.

Gross receipts taxes arise in two general contexts. First, gross receipts can represent the *subject* or legal incidence of a tax: for example, a tax on the gross receipts of a particular industry. Second, gross receipts can represent the *measure* of a tax: for example, a property tax or franchise tax measured by gross receipts. A tax on property measured by earnings is different from a tax on earnings. The controlling question in this case is the subject or legal incidence of the tax—not its measure. In a series of cases, this Court has held that taxes on gross receipts that derived from interstate commerce unconstitutionally violate the commerce clause. *See Meyer v. Wells, Fargo & Co.*, 223 U.S. 298 (1912); *Galveston, Harrisburg and San Antonio Ry. Co. v. Texas*, 210 U.S. 217 (1908); *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U.S. 326 (1887); *Fargo v. Michigan*, 121 U.S. 230 (1887).

In another series of cases, this Court has held that the inclusion of gross receipts from interstate commerce in the measure of state franchise or property taxes does not violate the commerce clause. *See Canton R. R. Co. v. Rogan*, 340 U.S. 511 (1951); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450 (1918; *United States Express Co. v. Minnesota*, 223 U.S. 335, 343 (1912); *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U.S. 379, 383 (1903); *Maine v. Grand Trunk Ry. Co.*, 142 U.S. 217 (1891). The

reasoning of these cases is that a franchise or property tax measured by gross receipts is not a tax imposed on gross receipts from interstate commerce that are otherwise exempt from state taxation. Thus, this Court has invalidated taxes levied *on the gross receipts* derived from the carriage of freight and passengers in interstate commerce; it has also upheld taxes imposed on the franchise or property of interstate businesses even though the taxes were measured by gross receipts from interstate commerce.

In a more modern judicial setting, compare *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359 (1954) (*REA I*) and *REA II*. *See also* 1 T. Cooley, The Law of *Taxation* 849 (4th ed. 1924).

This illustrates that a subject of taxation prohibited by Section 1513 (a) may be included in the measure of a subject of taxation permitted by Section 1513 (b). As stated in *United States Express*:

> A question, in principle, not unlike the one here presented, came before this court in *Flint v. Stone Tracy Co.*, 220 U.S. 107. In that case it was contended that the income of the corporations sought to be taxed under the Federal law, included, as to some of the companies, large investments in municipal bonds and other securities beyond the Federal power of taxation. It was held, after a review of some of the previous cases in this court, that, where the tax was within the legitimate authority of the Federal Government, it might be measured, in part, by the income from property not in itself taxable, and the distinction was undertaken to be pointed out between an attempt to tax property beyond the reach of the taxing power and to measure a legitimate tax by income derived, in part at least, from the use of such property. *Flint v. Stone Tracy Co., supra*, 162, 3, 4 and 5.

223 U.S. at 344. Thus, the airlines and their *amici* erroneously assume that no difference exists between a tax on

gross receipts from sales of air transportation and the PSC Tax (a property tax) measured by gross receipts from the airlines business.[30]

V. Hawaii's PSC Tax Is Permitted By Subsection (b) And Is Not Prohibited By Subsection (a).

The basic question in interpreting Section 1513 is what *taxes* did Congress expressly prohibit in subsection (a) in light of the *taxes* expressly permitted in subsection (b)?

Hawaii's PSC Tax is a tax expressly permitted by Section 1513(b). It is a tax imposed on the tangible property, intangible property, and going concern value of airlines as *measured by* their gross receipts (a property tax).[31] Because Congressional enactment of Section 1513 (b) specifically excluded the nondiscriminatory PSC Tax from the preemptive language of Section 1513(a), Hawaii Rev. Stat. 239-6 is not preempted. A contrary conclusion is not supported by the language of Section 1513(b), Congressional history, a technical interpretation of all the provisions of Section 1513, proper rules of statutory construction, or simple logic.

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[30]When a property tax is improperly measured by gross receipts (which is not the case here) it may well be construed as an invalid attempt by the state to impose a tax on exempt receipts. *See Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 301 (1912).

[31]The PSC Tax imposed by Hawaii Rev. Stat. 239-6 is a means of taxing the airline's personal property, including intangibles and going concern values. See *infra* pp. 7-8.

Neither the airlines nor their *amici* contend that the tax in question is a tax directly or indirectly imposed on persons or the carriage of persons traveling in air commerce. While they do not address this issue, they also do not argue that the tax in question is imposed "on the sale of air transportation or on the gross receipts derived therefrom." Clearly, the tax in question is not imposed either on the sale of air transportation or on the gross receipts derived from the sale of air transportation.

In support of a contrary position, the airlines and their *amici* argue that this case poses no serious statutory construction question because Section 1513(a) is not ambiguous and its plain meaning controls.[32] In failing to properly analyze the relationship of subsection (a) and subsection (b), they misstate the Congressional intent in enacting ADAP and give subsection (a) an unsupportable, irrational, and arbitrary interpretation. They argue that Section 1513(a) on its face manifests a clear intent to invalidate any taxes on airlines to the extent these taxes (irrespective of their subject, purpose, or taxable incidence) are measured by gross receipts traceable to the transportation of persons by air. This argument attempts to prove too much and directly conflicts with the language of subsection (b) which permits, for example, a sales or use tax on the sale of tangible property and on airline services.[33] Sales and use taxes are *always* measured by gross receipts derived from the sales of tangible personal property or the rendition of services within the state.[34]

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[32]The airlines and their *amici* rely upon subsection (b)'s use of the phrase "other than those enumerated in subsection (a)" and the phrase "or on gross receipts derived therefrom" in subsection (a) to support their arguments. (*See e. g.*, Br. of ATA at 5; Br. for the United States at 13.) However, subsection (a)'s phrase "on the gross receipts derived therefrom" modifies only the last antecedent phrase, the "sale of air transportation." See Br. for Appellee at Part IV.

[33]As noted by the Hawaii Supreme Court, carried to its logical conclusion, the argument of the airlines and their *amici* "decrees a federal preemption of the entire field of commercial aviation taxes" (Hawaiian Airlines Jur. Stmt. at A-13) in direct conflict with the express language of Section 1513(b). Most general business taxes are traceable, directly or indirectly, to the gross receipts generated by the business.

[34]See e. g., Wash. Rev. Code. Section 82.04.270 ("the gross proceeds of sales of such business"). See also the taxes discussed in *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110 (1954); *McLeod v. J.E. Dilworth Co.*, 322 U. S. 327 (1944); *General Trading Co. v. State Tax Comm'n*, 322 U. S. 335 (1944); *International Harvester Co. v. Department of Treasury*, 322 U. S. 340 (1944); *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937).

Section 1513(a) and Section 1513(b) should be interpreted to produce an internal harmonious whole, a statutory pattern that is also consistent with the policies and goals of ADAP as disclosed by its legislative history. When so construed, it is evident that Congress did not intend to exempt airlines from these taxes upon the happenstance that these taxes traditionally have been measured by gross receipts.[35] Subsection (b), consistent with subsection (a) and legislative history, evidences Congressional intent to permit the imposition of general business and property taxes on airlines, without placing any restrictions on the measures of these taxes.

VI. The Solicitor General Seriously Misinterprets the Statutes, the Legislative History, and the Congressional Policy Behind ADAP.

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[35]Hawaii's separate appendix of legislative history illustrates that only several passing references were made regarding taxes on "gross receipts." What the airlines, the Solicitor General, and the ATA ignore is that no legislative, economic, or political motive supports an argument that Congress allegedly intended to prohibit franchise or property taxes to the extent they are (historically) measured by gross receipts. What Congressional policy is served if Hawaii is permitted to use an alternate tax measure to impose a general tax burden that is double or triple the burden currently imposed under its allegedly invalid gross receipts measure?

For example, what Congressional policy is furthered if Hawaii is permitted to multiply its general tax burden so long as it measures its PSC Tax by capital stock, net income, or net worth (or imposes a property tax measured by *ad valorem* property value)? The argument of the airlines and their *amici*, that Congress intended to prohibit any general business tax that happens to be measured by gross receipts, lacks merit. This is illustrated by the statement in the Br. of the United States at 11 n.15, which lists five states "that tax annual gross receipts or gross income without expressly exempting airline gross receipts." This footnote is deceptive when associated with the text it supports: the citations to current code provision do not reveal that these taxes were enacted many years prior to Congressional adoption of ADAP and Section 1513.

The *amicus* brief filed by the Solicitor General seriously misinterprets the fundamental problem in these two cases. In arguing for broad tax exemptions for the airline industry, the Solicitor General argues that "[s]tate court decisions such as the present one, unless corrected, will progressively undermine the federal fiscal structure for the funding of civil aviation facilities." Br. for the United States at 10. The Solicitor General even goes so far as to argue that Congress amended ADAP by including the restrictions contained in subsection (a) to protect the "retained earnings, or ultimately the capital reserves of airlines" from any form of taxation measured by gross receipts. *Id.* at 12. The boundless implications of these statements are not supportable. The taxes actually enacted by Congress, which correspond to the preemption prohibitions in subsection (a), are all imposed on and paid by the *users* of air transportation, not the airlines. All the income generated from these user fees is earmarked for airport development.

Reduced to a syllogism, the Solicitor General argues as follows: (1) *Major Premise:* Congressional enactment of ADAP evidenced Congressional intent to promote airport development and safety; (2) *Minor Premise:* Congress imposed certain federal user taxes on persons using air transportation to finance airport development; (3) *Conclusion:* Therefore, Congress intended to exempt airlines from any existing general business or property taxes to the extent that these taxes are measured by gross receipts from sales of air transportation.[36] This argument is a ***non sequitur***. It is analogous to arguing that when Congress enacted a tax on A (user taxes)

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[36]To our knowledge, Congress has never granted preferential tax treatment and exempted a single industry (such as airlines) from any state or local tax.

to promote activity B (airport development), it intended to prohibit the states from imposing taxes on C (general business taxes measured by gross receipts) to promote unrelated activity D (general state government expenditures).

CONCLUSION

In the light of the history of Section 1513 and the specific language of subsection (b), coupled with the nature of the taxes that Congress actually imposed, there is little reason to assume that Congress intended to preempt any kinds of taxes other than taxes that would directly or indirectly duplicate the federal user taxes it imposed in 1970 on the *users* of air transportation. The general language in Section 1513, as illustrated by the legislative history, was to protect the federal user tax base by prohibiting the states or their political subdivisions from either directly or indirectly imposing similar kinds of taxes.

A vast difference separates subsection (a)'s prohibited *subjects* of state taxation from the general business or property taxes permitted by subsection (b) and the *measures* (such as gross receipts) of these permitted taxes. A property tax or general business privilege (franchise) tax, although *measured* by gross receipts, is not a tax on the sale of air transportation nor can such taxes discriminate against airlines.

Neither logic nor legislative history supports the argument of the airlines and their *amici* that Congress intended to give unprecedented state tax exemptions to a single business—the airlines—simply because some state taxes were traditionally measured by gross receipts. Obviously, the airlines initially interpreted the federal statute in this manner or they would not have waited many years to

bring this action, and comparable actions, in other state courts.[37] Their decision to rely upon Section 1513(a) to invalidate Hawaii's PSC Tax is obviously the result of a belated statutory interpretation that is devoid of any Congressional history or purpose or any concern expressed by the airlines in eliciting Congressional support for the enactment of Section 1513.

We therefore respectfully urge this Court to affirm the decision and judgments of the Hawaii Supreme Court in this consolidated case.

Respectfully submitted,

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Multistate Tax Commission and
Participating States

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[37]Representing most of the nation's scheduled airlines, the ATA gave extensive testimony at the Hearings held by both Houses of Congress. The ATA was thus aware of the intent and scope of Section 1513 as enacted. Several years passed before several cases, similar to this case, arose almost simultaneously in the various state courts. The ATA was the plaintiff in the litigation in New York State.

In January, 1983 the Washington Department of Revenue issued a Request for Production of Documents No. 2 in *Republic Airlines v. Washington Dep't of Revenue*, No. 82-2-01723-7 (Thurston County Super. Ct. filed Dec. 30, 1982). Washington's request was as follows:

> Any document prepared by or received by Republic describing the impact of the Airport Development Accelleration Act of 1973, 49 U. S. C. Section 1513, on the tax liability of Republic. We here do not seek privileged communications between counsel and client, but rather in-house memoranda or publications in the nature of trade publications received by Republic from trade associations or industry lobbyists.

Further proceedings in this cause, as well as the response to this request, have been held in abeyance until this Court decides these Hawaiian airlines cases.

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Nos. 82-585 and 82-586

IN THE

Supreme Court of the United States

October Term, 1982

ALOHA AIRLINES, INC.,
Appellant,
against
DIRECTOR OF TAXATION, STATE OF HAWAII.

HAWAIIAN AIRLINES, INC.,
Appellant,
against
DIRECTOR OF TAXATION, STATE OF HAWAII.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

Brief on Behalf of the State of New York as *Amicus Curiae*

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Nos. 82-585 and 82-586

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

ALOHA AIRLINES, Inc.,

Appellant,

against

DIRECTOR OF TAXATION, STATE OF HAWAII.

HAWAIIAN AIRLINES, Inc.,

Appellant,

against

DIRECTOR OF TAXATION, STATE OF HAWAII.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII.

Brief on Behalf of the State of New York as *Amicus Curiae.*

Interest of *Amicus Curiae.*

Aloha Airlines, Inc. and Hawaiian Airlines, Inc. challenge the right of Hawaii to impose a tax on airlines measured by gross income. The Hawaii tax was treated as a property tax by the Tax Appeal Court of the State of Hawaii. Its decision was affirmed by the Supreme Court of that State. The airlines claim that the tax violates the Supremacy and Commerce Clauses of the United States Constitution, alleging that the tax is proscribed by section 1113 of the Federal Aviation Act, 49 USC § 1513, enacted in 1973. In so doing, they have relied on New York lower court decisions holding that New York's franchise tax* on transportation and transmission companies, including aviation corporations since 1935,** measured by allocated gross earnings was preempted. The State's appeal to the New York Court of Appeals will be heard by that Court in early June.

While the Hawaii property tax*** and New York's longstanding franchise tax are, of course, different, the Court's opinion here could well have an affect on the validity of the New York franchise tax, a major revenue source.

Statutes Involved.

49 USC, § 1513, as amended by section 532 of the Airport and Airway Improvement Act of 1982,**** Pub L No 97-248, 96 Stat 701 provides in pertinent part:

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*These tax provisions are contained in section 184 of the New York Tax Law and are set forth in the Addendum to this brief.

**New York has imposed a franchise tax on transportation and transmission corporations measured by gross earnings since 1896 (ch 908, L 1896).

***We do not address the issue of whether the Hawaii tax is a property tax.

****This Act is Title V of the Tax Equity and Fiscal Responsibility Act of 1982, Pub L No 97-248, 96 Stat 324.

"(a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom * * *

"(b) Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *."

Section 239-6 of the Hawaii Rev Stat (replacing 1976) provides in pertinent part:

"*Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a special rate schedule for students * * * the tax shall be three per cent * * *. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [comprising the General Excise Tax law of Hawaii] but is not in lieu of any other tax."

ARGUMENT.

State property, net income, franchise taxes measured by gross receipts are not preempted by Section 1113 of the Federal Aviation Act.

Simply reading subsections (a) and (b) of section 1113 of the Federal Aviation Act demonstrates a superficial ambiguity in the statute in that it permits States to levy property and franchise taxes while barring indirect taxes on the gross receipts. However, the statute was not enacted in 1973 on a clean slate. It was written against a background of decisional law and state tax statutes, a background disregarded by appellants and the Solicitor General. When the statute is examined in that historical context and its legislative history, the congessional intent becomes clear. As we will show, Congress did not intend to prohibit States from imposing property and franchise taxes measured by gross receipts on airlines and that conclusion is fully consistent with the statute's language, properly construed.

A. It had been well settled when section 1113 of the Aviation Act was enacted in 1973 that including gross receipts as items that could be used as a measure for property and franchise taxes did not make them taxes on gross receipts.

At the time that section 1113 of the Federal Aviation Act was enacted in 1973, it was well established that States could use gross receipts as the *measure* of an otherwise constitutional tax, even though a tax imposed directly or indirectly on gross receipts might otherwise be invalid. See, Tribe, *Constitutional Law,* p 365.

Historically property and franchise taxes based on gross receipts have been viewed as taxes on the property, or a

local privilege or franchise, the value of which is measured by receipts. Thus, such property taxes have been sustained (*Great Northern Railway Co. v Minnesota,* 278 US 503 [1929]). In *Pullman v Richardson,* 261 US 330, 338 339 (1923), the Court said:

> "[A] State may elect and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce."

Similarly, gross receipts or gross earnings have simply constituted a "fair means of measuring a local privilege or franchise". *Western Livestock v Bureau of Revenue,* 303 US 250, 256, 257 (1938); see, also, *Railway Express Agency v Virginia,* 358 US 434, 441 (1959). The cases also establish that a tax imposed on the privilege of exercising a corporate franchise measured by gross earnings, income or capital is neither a direct nor an indirect tax on gross earnings, income or capital of a corporation. It follows that a tax measured by gross income is not a direct or an indirect tax on gross income.

A tax on gross receipts has long been viewed as distinct from taxes measured by the gross earnings or receipts of a corporation and is also not an *indirect* tax on gross receipts included in the yardstick. See *Werner Machine Co. v Director of Taxation,* 350 US 492 (1956). That case

involved the validity of a New Jersey franchise tax measured by a corporation's net worth. The taxpayer's net worth included obligations of the Federal government which are immune from state taxation under the provisions of 31 USC 742. The Federal statute provided at that time:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

This Court pointed out that this rule embraced "indirect taxation of such obligations through their inclusion in a tax imposed on all property of a taxpayer". But the Court in holding the franchise tax valid, said (350 US at p 494):

> "This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. See, *e.g.*, *Society for Savings v. Coite,* 6 Wall. 594; *Provident Institution v. Massachusetts,* 6 Wall. 611; *Hamilton Co. v. Massachusetts,* 6 Wall. 632; *Home Ins. Co. v. New York, supra; Educational Films Corp. v. Ward, supra; Pacific Co. v. Johnson, supra.* We have only recently adhered to this principle in another aspect of this field of taxation. See *Society for Savings v. Bowers, supra,* at 147-148. *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals,* 338 U. S. 665, on which appellant relies, is distinguishable, in that it did not involve a franchise tax, but rather a tax whose legal incidence this Court found to be upon the intangible assets of the corporation.

> "Since as applied here this is a permissible tax on the corporate franchise, the decision below must be *Affirmed.*"

In *People v. Home Insurance Company,* 92 NY 328 (1883), affd 134 US 594 (1890), a franchise tax case, the measurement of the tax included interest on United States bonds and the amount invested in United States bonds. The New York Court stated the issue as follows (*id,* at 338-339):

> "It thus appears that the only question presented for our consideration under this branch of the appeal is whether the tax in question was in fact levied upon the franchises of the defendant, which would be undeniably lawful, or upon the property of the corporation invested in the securities of the general government, which would be unlawful. It is not claimed that the law in terms assumes to authorize the taxation of the exempted securities, but *it is asserted that it effects this result indirectly, and, therefore, amounts to the exercise of a prohibited power.*" (Emphasis supplied.)

The Court, in upholding the tax, said (*id,* at 343):

> "Applying the tests derived from these authorities it seems conclusively established that the act under which this tax was levied must be held to have imposed a franchise and not a property tax, and that its enactment constituted a lawful exercise of legislative power * * * The income of these corporations is referred to only as a means of arriving at the measure of their liability. As was said in the *Provident Institution Case:* 'The subject matter to

> be taxed is the corporation, and the average amount of the deposits within the period named furnishes the basis of computing the amount.' * * * We feel constrained to hold that the tax in question was a tax on franchises alone, and was, therefore, within the exercise of legitimate legislative power."

In affirming, this Court in *Home Insurance Company v. New York,* 134 US 594, 600 (1890), said:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity * * * The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. *No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows* * * * " (Emphasis supplied.)

B. The legislative history of section 1113 of the Federal Aviation Act show no intent to exclude States' property and franchise taxes using gross receipts as a measure from the taxes expressly permitted under section 1113.

Contrary to the claims of appellants and the Solicitor General, there is absolutely no basis for a conclusion that property, net income, and franchise taxes were not within the taxes expressly protected by section 1113(b) of the Federal Aviation Act. As discussed above, it had long

been held that using gross receipts as a measure for taxes did not mean such a tax was a tax on gross receipts, either directly or indirectly. Nothing in the Aviation Act's legislative history shows that Congress intended to ignore such interpretations. Accordingly, the restriction on direct or indirect taxes on gross receipts in section 1113(a) is simply not applicable to property, net income, or franchise taxes.

1. An intent to preempt state taxes must be clearly shown by Congress.

When Congress speaks to proscribe the incidents on which state taxes may be imposed, it does so clearly and precisely. See, for example, the discussion in the annotation of 12 USCA 548, state taxation of national banks prior to 1973. The complete absence of any reference in the Congressional history of section 113 of the Federal Aviation Act, as we discuss below, to broad-based property, net income, and corporate franchise taxes, such as the tax which was then being imposed by the State of New York, supports the view that Congress had not the remotest intent of including them within the state tax proscription Congress set up in subsection (a) of the Federal Act. To the contrary, Congress, in subsection (b), carefully preserved state property, income and franchise taxes. Congress, in the past, has spoken with clarity when it desired to proscribe a particular type of taxation. These are the very considerations discussed by this Court in *Sullivan v United States,* 395 US 169 (1969). There the issue before the Court was whether Connecticut's sales and compensating use taxes were prohibited on sales to or uses by servicemen as a result of section 514 of the

Soldiers' and Sailors' Civil Relief Act. This Court observed, in holding that Congress never intended to bar state sales and use taxes, that (395 US at 178):

> "The absence of any reference to sales and use taxes in the history of § 514 is particularly illuminative of legislative intent when considered in the light of Congress' full awareness of such state taxes and their relationship to federal interests. Sales and use taxes were prevalent by 1942, and congress had dealt specifically with them only two years earlier. In the 1940 Buck Act, Congress provided that the States have 'full jurisdiction and power to levy and collect' sales and use taxes in 'any Federal area,' except with respect to the sale or use of property sold by the United States or its instrumentalities through commissaries, ship's stores, and the like. If nothing else, this statute illustrates that Congress in 1942 was fully cognizant of state sales and uses taxes and identified them by name when it wanted to deal with them."

Here, if Congress wished to prohibit taxes other than those "on the gross receipts" from the sale of air transportation, it could have said so clearly as it has done with other prohibitions of state taxes. Instead, it expressly protected property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services without restriction.

Moreover, the power to tax is an attribute of state sovereignty and is one of the functions essential to independent state existence. In fact, a State's taxing powers is not conferred by the Federal Constitution but exists independently of it. *People ex rel. Hatch v Reardon,* 184 NY

431 (1906), affd 204 US 152 (1907). Thus, it has long been recognized that "historic * * * powers of the States [are] not to be superseded" by Federal law, "unless that was the clear and manifest purpose of Congress". *Rice v Santa Fee Elevator Corp.*, 331 US 218, 230 (1974); accord, e.g., *Ray v Atlantic Richfield Co.*, 435 US 151, 157 (1978).

It is clear, we submit, that Congress did not intend to preempt state taxes measured by gross receipts by subsection (a) of section 1113 of the Federal Aviation Act. In addition, the entire statute demonstrates that Congress reaffirmed the rights of States to have airlines pay for the privileges, protection and services which they and their property receive.

2. *The legislative history of section 1113 of the Federal Aviation Act shows no intent to preempt States from applying broad-based property and franchise taxes to airlines.*

Section 1113 of the Federal Aviation Act was enacted in response to the *Evansville-Vanderburgh Airport* case, 405 US 707, 721, 722 (1972). In that case, the Court upheld the validity of a city-imposed "use and service charge" of $1.00 on each enplaning commercial passenger at Evansville, Indiana, which was collected from the passenger, and a New Hampshire State Law levying a $1.00 charge on the airline for each passenger on large commercial airlines, and 50 cents for each passenger on smaller planes. The Court ruled that States and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers where there was no Federal statute or specific congressional action evidenced a purpose to preempt state power.

The statements by the prime sponsors* when the bills were introduced, statements in the committee reports, and statements by managers and others on the floor of both houses confirmed that the prime impetus for the prohibitory language was to ban the proliferating head taxes and similar taxes directed against airlines.** This is further borne out by the 1982 amendment to the law, section 532 of the Airport and Aviation Improvement Act of

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*Though the Act was not enacted until 1973, an earlier version was passed by both Houses of Congress in 1972, but was pocket vetoed by President Nixon. See, 118 Cong Rec 35862 (Oct. 13, 1972) (Senate passage of Conference Report); *id.* at 35116 (Oct. 11, 1972) (House passage); *id.* at 37203 (announcement of pocket veto).

Senator Magnuson was one of the two prime sponsors in the Senate, see *id.* at 22598. Representative Adams sponsored legislation in the House and conducted most of the hearings on the various proposals. See, hearings on HR 2337, 14847, and 10326 (and identical bills) before the Subcommittee on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92nd Cong, 1st Sess (1972).

The relevant legislative history of the Act spans two sessions of Congress.

**The Senate Commerce Committee stated in its report on the bill:

> "S.38 contains a prohibition on state taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax."

S. Rep. 12, 93rd Cong., 1st sess. 11-12 (1973).

See, e.g., H. Rep. 1279, 92nd Cong., 2d sess. 2, 4 (1972); S. Rep. 1005, 92nd Cong., 2d sess. 20-25 (1972); S. Rep. 12, 93rd Cong., 1st sess. 4, 12, 17 (1973), H. Rep. 157, 93rd Cong., 1st sess. 2-3, 10 (1973); 118 Cong. Rec. 22599 (June 27, 1972) (remarks of Sen. Cannon), *id.* at 27815 (Aug. 10, 1972) (remarks of Sen. Cannon), *id.* at 27816 (remarks of Sen. Cotton), *id.* at 27826-27 (remarks of Sen. Hartke), *id.* at 27828 (remarks of Sen. Spong), *id.* at 29153 (Aug. 15, 1972) (remarks of Rep. Staggers); 119 Cong. Rec. 214 (Jan. 4, 1973)

(Continued on following page)

1982. At the same time, Congress intended to reconfirm to the States major sources of revenue.***

The clearest congressional statement of the intent and scope of section 1113 of the Federal Aviation Act is found in Senate Report 93-12. In its discussion of the state tax prohibition, the Report states:

> "[The bill prohibits] a new, inequitable and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburg Airport Authority District,*

(Footnote continued)

(remarks of Sen. Cannon), *id.*, at 3928 (Feb. 8, 1973) (remarks of Rep. Adams), *id.* at 13898 (May 2, 1973) (remarks of Rep. Staggers), *id.* at 13899 (remarks of Rep. Kuykendell), *id.* at 13900 (remarks of Rep. Jarman), *id.* at 13905 (remarks of Rep. Adams).

***The senior staff counsel for the Ways and Means Oversight Subcommittee of the United States House of Representatives wrote:

> "The approach taken by the Airport Development Acceleration Act broadly restricts states from imposing taxes or 'other charges' with respect to air commerce, but exempts from this broad restriction certain types of taxes such as property, income, franchise, and sales or use taxes. The exempted taxes are, of course, the major revenue sources for states and, accordingly, the Act effectively balances national interests and those of the states' revenue needs with respect to air commerce."

Parnell, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States,* 28 Cath UL Rev 227, 246 (1979).

> *et al. v. Delta Airlines, Inc., et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for 'aviation-related purposes'. While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adquate safeguards to prevent undue or discriminatory taxation." (US Code Congressional and Admin News, 93rd Cong, 1st Session, Vol 1, p 1446)

Throughout the report, the type of tax primarily discussed is a passenger head tax, whether paid directly by the passenger or absorbed by the carrier. The tax is described in the report as a flat rate on passengers, regardless of the distance traveled by the passenger.

In regard to subsection (b) of section 1113, which makes clear other state taxes are not prohibited, the Conference Report states:

> "The Senate bill also provided that *the prohibition would not extend to* the levy or collection of *other taxes, such as property taxes,* net income taxes, *franchise taxes,* and sales taxes, and sales or use taxes, nor to the levy or collection of other charges such as reasonable rental charges, landing fees, and other services charges from aircraft operators for the use of airport facilities." (Conference Report No. 93-225, found in US Code Congressional and Admin News, 93rd Cong, 1st Session, Vol 1, p 1458) (Emphasis added.)

The legislative history of the Federal Act found in the Subcommittee Hearings and Reports is replete with discussions of the limited scope of the state tax prohibition intended by Congress (Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, Ninety-Second Congress, 2nd Session, on HR 2337, HR 14847 and HR 10326, Serial No. 92-74 [hereinafter referred to as "Subcommittee hearings, Ninety-Second Congress"] and Ninety-Third Congress, 1st Session, on HR 4082, *et al.*, Serial No. 93-6 [hereinafter referred to as "Subcommittee hearings, Ninety-Third Congress"]).

In the hearings there is limited discussion of a unique Ohio Airlines excise tax. The concern of the Subcommittee and of the industry witnesses was the proliferation of discriminatory, selective state taxes in the form of the *Evansville* type of taxation or the Ohio Airlines excise tax.

The Ohio excise tax on airlines read as follows:

> "Section 5745.02. *Tax imposed on transporting by air.*—For the purpose of providing revenue for the use of the general revenue fund of the state * * * an excise tax is hereby imposed upon the privilege of engaging in the business of transporting persons, or property by air within this state." (Emphasis supplied.)

The measure of the Ohio tax was four (4) percent of the receipts derived from or attributable to business carried on within Ohio.

Theodore Koetz, then Ohio Deputy Tax Commissioner, testified before the Congressional subcommittee on considering the Federal Aviation Act stated:

> "We have an airlines excise tax in Ohio which is unique, and we are probably the only state in the 50 states that has such a tax. (p. 246 of Subcommittee Hearings, Ninety-Third Congress).
>
> "The Ohio tax structure may be unique in reference to airlines. Most businesses in Ohio, be they domestic or foreign, intrastate or multistate, are amenable to a *franchise tax* and a personal property tax * * * However, the airlines are fully subject only to the corporate franchise tax. [And a less burdensome property tax and the airlines excise tax.]" (Emphasis added, p 247.)

The Ohio Supreme Court when examining the Ohio airlines excise tax had clearly distinguished the Ohio franchise tax (which as applied to airlines may include receipts from the sale of air transportation in the calculation of its base) from the Ohio Airlines excess tax as follows in *United Airlines v Porterfield,* 276 NE2d 629, 635 (1971), app dsmd 401 US 917 (1972):

> "R.C. 5733.01, Ohio's corporation franchise tax statute, provides, in pertinent part:
>
> '* * * the tax * * * for foreign corporations shall be [1] for the privilege of doing business in this state, [2] owning or using a part or all of its capital or property in this state, or [3] holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable.'
>
> "United is subject to the tax provided for by that statute, measured, in part, by the amount of the

> receipts from airline passenger tickets issued in Ohio for both intrastate and interstate flights. See *American Airlines v. Porterfield* (1970), 21 Ohio St. 2d 272.
>
> "We mention the franchise tax to clearly reveal that we are mindful that *the tax in issue in the instant case is not another franchise tax on the right to do business in Ohio* in the corporate form of organization, and that the airline tax is not levied in lieu of other state taxes." (Emphasis supplied.)

Mr. Tipton, the Chairman of the Air Transportation Association of America, Inc., described the Ohio tax in his testimony at the Transportation and Aeronautics Subcommittee Hearings on section 1113 (Ninety-third Congress, First Session) at page 98, as follows:

> "Particularly dangerous, burdensome, and discriminatory in our judgment is one state's imposition of a tax on the gross receipts derived from *the sale of interstate air transportation—a so-called airlines excise tax.* This tax is levied at a rate of 4 percent on airline receipts in that state 'for the privilege of engaging in the business of transporting persons or property by air.' "

He did not voice any objection to taxes measured by gross receipts. The state tax prohibition of subsection [a] initially considered by the Ninety-Second Congress contained the prohibition of a state or local tax on: [1] "persons traveling in air commerce" and [2] "the carriage of persons in air transportation" (HR 14847, p 2, lines 18-22; HR 2337; p 1, lines 6-9). The legislative history indicates that the language "on the sale of air transportation or on the gross receipts derived therefrom" added to the final

text of section 1113 was directed specifically at Ohio's airlines excise tax. With the addition of this language, subsection (b) was added to assure and reaffirm state taxing power. It circumscribed the taxes prohibited by subsection (a).*

In addition to New York whose franchise tax on transportation companies engaged in aviation dates *back to 1935,*** Maryland has had a franchise tax on transportation companies which is imposed on airlines. It, too, was in effect in 1973. The tax is measured by gross receipts (Annot Code of Maryland, Art 81, §§ 129, 130).

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*In November, 1973, the State of Ohio, *sua sponte,* in an opinion by its Attorney General, declared that Ohio's airline excise tax "must be discontinued because it conflicts with section 1113 of the Federal Aviation Act." The opinion is not expansive and did not elaborate on the reasoning which led to the legal conclusion. It is, however, consistent with both the language and history of the Aviation Act, as we have discussed.

**49 USC 1301 defines "air commerce" and "air transportation". The definitions are applicable to those terms as used by section 1113 of the Federal Aviation Act. The definitions are as follows:

> "(4) 'Air Commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
>
> • • •
>
> "(10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

(Continued on following page)

One of the major taxes of the State of Washington, which does not have an income tax, has for many years been its public utilities tax which is imposed on corporations, including airline corporations. It is imposed on the "act or privilege of engaging * * * in * * * business." The tax is measured by gross income. The tax, prior to 1973, had been construed to be a franchise tax. *Public Utility District No. 3 of Mason County v State,* 427 P2d 713, 715 (Wash, 1967). Interestingly, one of the sponsors of Senate Bill 3755, 92d Cong, which included section 1113 of the Federal Aviation Act as enacted, was Senator Magnuson of the State of Washington. Representative Adams, also from the State of Washington, sponsored the legislation in the House. It is doubtful that they intended to preempt Washington's nondiscriminatory tax on airlines and other utilities and carriers.*

It is also significant that Congress has been mindful of the long-established difference between taxes and their measurement. Thus, when it amended 31 USC § 742 in

(Footnote continued)

It appears that if Congress had intended to preempt the levy of New York's section 184 franchise tax, the preemption, because of the broad definition of "air commerce", would extend to gross earnings from the sale of air transportation of persons, regardless of whether it is intrastate, interstate, overseas, or foreign. Thus, if the New York tax now violates section 1113, it would have violated section 1113 from January 1, 1974, even before the enactment of chapter 486 of the Laws of 1981 which amended the New York tax to include gross receipts from interstate transportation in its measurement base. Airlines in New York paid the tax measured by their gross intrastate earnings until the 1981 amendment of section 184 without raising an objection that the tax was preempted by the Federal law. No objection was voiced to the New York tax or other State franchise taxes in the Congressional hearings.

*The Committee on Transportation and Aeronautics included Congressman Bertram L. Podell of New York. The Committee on Interstate and Foreign Commerce included Congressmen Bertram L. Podell, James F. Hastings and Norman F. Lent of New York and Goodloe E. Byron of Maryland. These Committees held the hearings on section 1113 of the Federal Aviation Act.

1959, which prohibits state taxes on Federal obligations, it preserved non-discriminatory franchise taxes. That section now provides:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. *This exemption extends to every form of taxation* that would require *that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax,* except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." (Emphasis supplied.)

The purpose behind that amendment is stated in the Bill's legislative history, 59 US Code Cong & Admin News, pp 2773-2774, as follows:

> "D. CLARIFYING EXEMPTION OF U. S. OBLIGATIONS FROM STATE OR LOCAL TAXATION
>
> "Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U. S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income'

> upon which taxable net income is determined. The bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, *except nondiscriminatory franchise taxes* (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes." (Emphasis supplied.)

The present statute adopts a comparable scheme, again preserving property, net income, and franchise taxes. We submit that Congress expressly intended to exempt these three types of taxes, even though gross receipts are used as a measure.

CONCLUSION.

For these reasons, the Court should find that state property, income and franchise taxes, even if measured by gross receipts, are not prohibited by section 1113 of the Federal Aviation Act.

Dated: Albany, New York
May 9, 1983.

Respectfully submitted,

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ADDENDUM.

New York Franchise Tax on Transportation and Transmission Companies.

The relevant provisions of section 184 of the New York State Tax Law, as amended by Chapter 486 of the New York Laws of 1981 provides as follows:

> "§ 184. Additional franchise tax on transportation and transmission corporations and associations.
>
> "1. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owing or leasing property in this state in a corporate or organized capacity or maintaining an office in this state, shall pay a franchise tax which shall be equal

to three-quarters of one per centum upon its gross earnings from all sources within this state

* * *

4. Allocation of gross earnings from transportation and transmission services. —(a) Generally. A transportation or transmission corporation shall determine its gross earnings from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without the state during the period covered by the report or reports required by this chapter.

(b) Aviation corporations. An aviation corporation shall determine its gross earnings from transportation services within this state by multiplying its gross earnings from transportation services within and without this state by the arithmetical average of three ratios based on arrivals and departures, revenue tons handled and originating revenues during the period covered by the report or reports required by this chapter:

(i) the ratio which the aircraft arrivals and departures within this state by any such corporation during the preceding calendar year bear to the total aircraft arrivals and departures within and without this state during the same period, provided, however, arrivals and departures solely for

maintenance or repair, refueling (where no debarkation or embarkation of traffic occurs), arrivals and departures of ferry and personnel training flights or arrivals and departures in the event of emergency situations shall not be included in such arrival and departure ratio; provided, further, the state tax commission may also exempt from such ratio aircraft arrivals and departures of all non-revenue flights including flights involving the transportation of officers or employees receiving air transportation to perform maintenance or repair services or where such officers or employees are transported in conjunction with an emergency situation or the investigation of an air disaster (other than on a scheduled flight); provided, however, that arrivals and departures of flights transporting officers and employees receiving air transportation for purposes other than specified above (without regard to remuneration) shall be included in computing such arrival and departure ratio;

(ii) the ratio which the revenue tons handled by such corporation at airports within the state during the preceding calendar year bears to the total revenue tons handled by it at airports within and without this state during the same period; and

(iii) the ratio which such corporation's originating revenue within this state for the preceding calendar year bears to its total originating revenue within and without this state for the same period. As used in this section the term 'aircraft arrivals and departures' means the number of landings and takeoffs of the aircraft of an aviation corporation,

and the number of air pickups and deliveries by the aircraft of such corporation; the term 'originating revenue' means revenue to any such corporation from the transportation of revenue passengers and revenue property first received by such corporation either as originating or connecting traffic at airports and the term 'revenue tons handled' by any such corporation at an airport means the weight in tons, of revenue passengers (at two hundred pounds per passenger) and revenue cargo first received either as originating or connecting traffic or finally discharged by such corporation at such airport.

* * *

(e) All other gross earnings, if any, shall be allocated to this state in the manner prescribed by rules and regulations promulgated by the tax commission.

(f) With respect to other types of transportation and transmission corporations or where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources within this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state. Also, the tax commission may, in order to properly reflect gross earnings, determine the report period in which any item of gross earnings shall be included without regard to the method of accounting employed by a corporation taxable hereunder."

No. 82-585-ASX
Status: GRANTED

Title: Aloha Airlines, Inc., Appellant
v.
Director of Taxation of Hawaii

Docketed:
October 4, 1982

Court: Supreme Court of Hawaii

Counsel for appellant: Griffith, Richard L., Anderson, Martin

Vide:
82-586

Counsel for appellee: Hong, Tany S., Wakayama, Kevin T.

See also:
83-162

Entry	Date	Note	Proceedings and Orders
1	Oct 4 1982	G	Statement as to jurisdiction filed.
3	Oct 21 1982		Order extending time to file response to jurisdictional statement until December 3, 1982.
4	Nov 29 1982		Motion of appellee Dir. of Taxation of HI to dismiss or affirm filed.
5	Dec 1 1982		DISTRIBUTED. January 7, 1983
6	Dec 7 1982	X	Brief amicus curiae of United States filed. VIDED.
7	Dec 9 1982	X	Reply brief of appellant Aloha Airlines, Inc. filed.
8	Jan 10 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with No. 82-586 and a total of one hour is allotted for oral argument.
			**********
10	Feb 8 1983		Order extending time to file brief of appellant on the merits until March 11, 1983.
11	Mar 10 1983		Brief of appellant Hawaiian Airlines, Inc. filed. VIDED.
12	Mar 10 1983		Brief of appellant Aloha Airlines, Inc. filed. VIDED.
13	Mar 10 1983		Joint appendix filed. VIDED.
14	Mar 11 1983		Brief amicus curiae of Air Transport Assn. filed. VIDED.
16	Mar 28 1983		Order extending time to file brief of appellee on the merits until May 13, 1983.
17	Mar 31 1983		Record filed.
18	Mar 31 1983		Certified original record, box, received.
19	Apr 1 1983	D	Motion of appellee for divided argument filed.
20	Apr 18 1983		Motion of appellee for divided argument DENIED.
21	Apr 21 1983		Application for leave to file appellee's brief on the merits in excess of page limitations, and order denying same by Rehnquist, J., 4/23/83.
22	Apr 21 1983		
23	May 10 1983		Brief amicus curiae of State of New York filed. VIDED.
25	May 16 1983		Brief of appellee Dir. of Taxation of HI filed. VIDED.
26	May 16 1983		Appendix of appellee Dir. of Taxation of HI filed. VIDED.
27	May 16 1983	G	Motion of Multistate Tax Commission, et al. for leave to file a brief as amici curiae filed.
28	May 16 1983		Brief amicus curiae of Alaska, et al. filed. VIDED.
29	May 25 1983		DISTRIBUTED. June 9, 1983
31	Jun 13 1983		Motion of Multistate Tax Commission, et al. for leave to file a brief as amici curiae GRANTED.
32	Jul 8 1983		CIRCULATED.
33	Aug 15 1983		SET FOR ARGUMENT. Tuesday, October 4, 1983. (4th case) The case is consolidate with case No. 82-586. (1 hr.)
34	Sep 21 1983	X	Reply brief of appellant Hawaiian Airlines, Inc. filed. VIDED.

No. 82-585-ASX

Entry	Date	Note	Proceedings and Orders
35	Sep 21 1983	X	Reply brief of appellant Aloha Airlines, Inc. filed. VIDED.
36	Oct 4 1983		ARGUED.

END OF DOCKET